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United States
Circuit Court of Appeals

For the Ninth Circuit.

Apostles on Appeal.
(IN TWO VOLUMES.)

FIREMAN'S FUND INSURANCE COMPANY, a
Corporation,

Appellant,

vs.

THE GLOBE NAVIGATION COMPANY, a Corpora-
tion, and S. P. WESTON, as Trustee in Bank-
ruptcy of the GLOBE NAVIGATION COM-
PANY, a Corporation, Bankrupt,

Appellees.

VOLUME II.
(Pages 321 to 616, Inclusive.)

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

Filed

AUG 26 1915

(Testimony of Capt. A. W. Swenson.)

Q. At the very extreme sides of the vessel?

A. Yes, sir, that is right.

Q. That is the only way you can explain it?

A. Yes, sir.

Q. It did not go down through the deck itself?

A. No.

Q. And you were asked this morning about the water she had in her, when she was towed from Astoria to Portland. There were places in Astoria where her cargo could have been discharged on to the docks, were there not, if necessary?

A. I do not think there is any place in Astoria where it can be discharged.

Q. Are there not lots of docks?

A. There are lots of docks, but nothing but old dilapidated things not fit to hold cargo.

Q. The Hammond Lumber Company has a very extensive system of docks there, has it not?

A. They have, but their docks are all piled full of lumber at all times.

Q. I did not ask you as to whether or not they would have permitted you to use them. I asked you whether there were docks that could have been used, or practicable to use, if you could have gained the consent of the owners?

A. The Hammond Lumber Company's was practically the only dock that could be used for lumber in Astoria.

Q. But there are docks extending along the waterfront in Astoria for a mile, are there not?

(Testimony of Capt. A. W. Swenson.)

A. Yes, I expect more than that. Fishermen's wharves. [297]

Q. Now, at the time this vessel was towed to Portland, she had been pumped out by the tug "Wallula," had she not? A. Yes.

Q. So that she had about, in your judgment, three feet of water in her? A. Yes, sir.

Q. Did you measure it to see how much?

A. I did.

Q. Was the steam-pump in working order at that time? A. Yes, sir.

Q. Could you have taken out the remaining water with the steam-pump?

A. Well, they could have done so, but I was not in charge of the vessel.

Q. But I ask you whether it was possible?

A. Yes.

Q. It could have been done? A. Yes, sir.

Q. Now, there was no difficulty in this towage from Astoria to Portland, was there?

A. We had no accident, no.

Q. How did the tug tow, alongside or ahead?

A. Alongside.

Q. You did not think you were going to go ashore going up the river, did you, or strand?

A. I did not think so, no.

Q. It was practically the same as any other towage on the river, was it not?

A. Well, apparently it was at that time.

Q. Now, Captain, what did you mean by saying this morning [298] that it was not necessary to

(Testimony of Capt. A. W. Swenson.)

have any oakum in this seam between the ends of the plank and the stern post where you found this seam to be?

A. I did not say it was not necessary, Mr. Campbell.

Q. I beg your pardon, I thought that was what you said. What was it you said?

A. I said if a vessel was constructed right and the plank was fit and proper shape, that as a matter of fact if there was no oakum for this little space, it would not matter very much, as far as filling the vessel was concerned, a space of six inches. The construction should be so that the plank butts tight on the woodwork.

Q. You did not see this vessel when she was constructed? A. No.

Q. You never have been able to get in there to see how tightly that planking butts on the stern post?

A. I have not.

Q. Did not you find some soft seams above this large seam? A. No.

Q. Did you try the seams above it? A. I did.

Q. And they were all solid?

A. Apparently, yes.

Q. This gale that sprang up was a very heavy squall from the northwest?

A. Yes, a very heavy squall, blew hard for about an hour, very hard.

Q. Then passed off? A. A little bit less.

Q. What you would term a squall was it not, what you would [299] term at sea a squall?

(Testimony of Capt. A. W. Swenson.)

A. No, it was different from what we term a squall. The northwest wind usually comes that way, the way that one came.

Q. At the time Captain Crow examined her, before loading at Westport, you did not sling any staging under the stern so that he could get in and examine these seams? A. No, I did not.

Q. Or examine the water-closet flange?

A. No, I did not.

Mr. CAMPBELL.—I offer this telegram I read to the witness in evidence.

Paper marked Defendant's Exhibit 15, filed and returned herewith.

Redirect Examination.

Q. (Mr. CLISE.) Now, Captain, when you examined the vessel at St. John's and you found these soft spots, were they sufficient to allow any leakage into the vessel?

A. I do not think they were sufficient to—

Q. Well now, how long were you with the vessel at St. Johns?

A. I was there practically for six months.

Q. When did you leave her?

A. I think it was in April.

Q. 1912? A. 1912.

Q. Well, how long was she in dry dock?

A. She was only there a few hours.

Q. Well, if she was dry docked on or about the 8th or 10th or 11th of December, she was in the water then from that time until you left her, was she? [300]

(Testimony of Capt. A. W. Swenson.)

A. Yes, sir.

Q. Well, did she make water during that time?

A. No.

Q. Now, did you mean to state in answer to any question by counsel, that the vessel was ever in a leaky condition, in the way that term is usually used or at all?

A. She was never in a leaky condition, no.

Q. Have you ever been able to arrive at any satisfactory conclusion as to just how these leaks occurred? A. I have not.

Q. Now, when the vessel was examined at Astoria by Captain Crow, was he afforded every facility that he requested?

A. Every facility that he requested was accorded him.

Q. Now, then, when he asked you to test the pumps, did he request you to test the pumps by sucking water in over the side? I am inquiring at the time Captain Crow examined the vessel at Astoria, after she had discharged the coal. That is the time when he made the preliminary survey before loading for this voyage. That was the way he requested you to test the pumps, was it?

Mr. CAMPBELL.—Let him state what the facts were.

Q. I ask you if that was the way he requested you to make the examination. What request did he make of you?

A. He asked if the steam-pump was in working order, and I told him yes, I thought it was. He says,

(Testimony of Capt. A. W. Swenson.)

“Will you let me see it work?” “Certainly.” And so we just went there and started it up and I told him at the time, I says, “I do not think she has water enough in her to fetch the bilges.” He says, “How much water has she got in her?” I says, “She has got about seven or eight inches of water in her, not enough for the hand-pumps to fetch, even.” [301] So of course we startel it, and of course she would not fetch water, there was not water enough there to come up; in the suction-hose that we had been using, it was hanging right there over the side, and we turned that on and it worked all right.

Q. He was there to personally see this, was he?

A. Yes, he was.

Q. Now, when Captain Cherry made this examination, how did he happen to make the examination?

A. He was requested.

Mr. CAMPBELL.—I object to any testimony about Mr. Cherry. There is no evidence in the record to show that Mr. Cherry was agent of the defendant.

A. Mr. Cherry was requested by Captain Crow to make the final examination and survey, as Crow was unable to be present.

Q. To whom did he make the report—

Mr. CAMPBELL.—I move to strike the testimony as hearsay.

Q. To whom did you make the request for this examination? A. To Captain Crow.

Q. How long have you known Mr. Cherry?

A. Four or five years.

(Testimony of Capt. A. W. Swenson.)

Q. Has he ever made examinations of other vessels for you on behalf of Captain Crow?

A. Not for me, but I understand that he done it on several occasions for other vessels.

Mr. CAMPBELL.—I move to strike the conclusion of the witness and as hearsay.

Q. Did Mr. Cherry make any statement to you after he had examined the vessel as to whom he was to make a report? [302] A. He did.

Q. To whom did he say he was to report?

Mr. CAMPBELL.—I object, there is no evidence in the record that Cherry was agent of the defendant.

A. To Captain Crow.

Q. From whom did you receive this report signed by Captain Crow, known as Plaintiff's Exhibit "N"?

A. This was given me by Mr. Cherry.

Q. (Mr. BOGLE.) Was that after he made the inspection which you said he was making at the request of Captain Crow?

A. Yes, sir, after he made the examination.

Q. (Mr. CLISE.) Mr. Cherry made this examination, and was he afforded every facility he requested for making the examination?

Mr. CAMPBELL.—My objection goes to all of this testimony as to Cherry.

A. He was.

Q. Now referring to the two reports that you made. One is the report which is in evidence here as Defendant's Exhibit 14, and the other the report which you made to the adjusters. Tell just exactly how these reports were made up, what you did do.

(Testimony of Capt. A. W. Swenson.)

A. This report (exhibit 14) was made entirely by myself after I came ashore without any help whatsoever. I had no one to refresh my memory or ask me any questions. The report I made to the adjusters was made to Mr. Becket, and he asked me several questions, which helped me to get data etc., down that I had omitted in this one.

Q. Who is Mr. Becket?

A. He is a representative of Johnson & Higgins, the adjusters. [303]

Q. Now were the words that were contained in the report to the adjusters your own words or were they the words that were written out by Mr. Becket, and you afterwards read over and signed, on making up the report from the verbal statements that you had made to him?

Mr. CAMPBELL.—I think you should show the witness the statement to the adjusters, and see if he can remember the report.

A. It was my own words, only he helped me to construct the data, etc.

Q. Did you dictate to a stenographer?

A. Yes, sir.

Q. (Mr. CAMPBELL.) Then at the time Becket was assisting you you did not recollect that the top of your deck-load had shifted four inches when you put her on the starboard tack?

A. No, I did not recollect it at that time.

Mr. CAMPBELL.—Are you going to offer the adjustment?

Mr. CLISE.—Yes.

(Testimony of Capt. A. W. Swenson.)

Q. I would like to have the witness identify the report contained in the adjustment, which he made before the adjusters. Did you read the report you made to the adjusters before you signed it?

A. I did.

Q. (Mr. CLISE.) Is the statement contained in the report of the adjusters substantially the same as the report you made to the adjusters? [304]

A. Substantially the same, only added a word here and there, that has changed my wording a little bit.

Q. Has their changing of a word or two, in your opinion changed the meaning.

A. Yes, sir, it has. There is this word which always states "immediately." There is never such a thing as "immediately." The pumps were started before it was discovered she was leaking, the pump was going before that time. We do not wait to find out if a vessel is leaking before we start the pumps.

Q. With the exception of that word "immediately" the report contained in the adjustment is substantially the same as you made it to the adjuster.

(Testimony of witness closed.)

Mr. CLISE.—We will have the usual stipulation in this case, waiving the signature of the witnesses?

Mr. CAMPBELL.—Yes, sir. [305]

Seattle, Washington, September 2, 1913.

Present: Mr. CAMPBELL, for the Defendant.

Mr. CLISE and Mr. BOGLE, for the Plaintiff.

[Testimony of George F. Thorndyke, for Plaintiff.]

GEORGE F. THORNDYKE, recalled for the plaintiff, testified as follows:

Q. (Mr. BOGLE.) You are general manager of The Glove Navigation Company? A. I am.

Q. Where is the Globe Navigation Company's principal place of business? A. Seattle.

Q. Is that the home port of the "Nottingham"?

A. She is registered in Port Townsend, hailing from Seattle.

Q. Has the Firemen's Fund Insurance Company, the defendant in this case, established offices in the state of Washington? A. Yes, sir.

Q. Where?

A. Seattle, in the Colman Building.

Q. Who is the agent? A. Mr. Frank Taylor.

Q. Did you take out this insurance? A. I did.

Q. Both policies? A. I did.

Q. To whom did you apply for it?

A. Mr. Taylor, of the Firemen's Fund Insurance Company.

Q. Where? [306]

A. Colman Building, Seattle.

Q. Was that application made in writing or personally? A. Personally, probably.

Q. Did you subsequently receive the policy.

A. I did.

Q. Both policies? A. I did.

(Testimony of George F. Thorndyke.)

Q. From whom? A. Mr. Taylor.

Q. Where? A. Seattle.

Q. Did you pay the premium? A. I have.

Q. Where? A. Seattle.

Q. To whom? A. Mr. Taylor.

Cross-examination.

Q. (Mr. CAMPBELL.) When did you begin to place your insurance direct with the Firemen's Fund?

A. I think that was the second year that I had done business with Taylor, with the Firemen's Fund direct.

Q. The years 1910, 1911 *and 1911* and 1912, you did that business direct with the Firemen's Fund?

A. I think so. I will not say positively. I am under the impression that I did business with Taylor and the Firemen's Fund these two years, but it may be that I only did it that one year.

Q. Was this policy issued to you direct? (Showing paper to [307] witness.)

A. I could not say.

Q. Who handled your insurance prior to the time you began to place it direct with the Firemen's Fund? A. I think Johnson & Higgins.

Q. Don't you know?

Mr. CLISE.—For what length of time?

Mr. CAMPBELL.—From 1908, for the period following 1908 to the date he began to place the insurance direct with the Firemen's Fund.

Q. Did not Johnson & Higgins act for you in the placing of your insurance on all of your vessels?

(Testimony of George F. Thorndyke.)

A. I do not remember anybody else acting for us, in the hiring of insurance except Johnson & Higgins. We have several kinds of insurance. Mr. Frederick's company has underwritten for us and Mr. Hudson and Mr. Alexander of the Calhoun, Denny & Ewing, have underwritten insurance for us. Without looking at the record I would not want to state positively that I never hired insurance except through Johnson & Higgins in the Firemen's Fund. My best recollection is they placed our whole insurance with Johnson & Higgins all the time up to the time I commenced with the Firemen's Fund with Mr. Taylor.

Q. Johnson & Higgins acted as your agents in placing your whole insurance with various companies?

A. Johnson & Higgins were Insurance Brokers.

Q. And you went to them to engage their services to place insurance on your vessels in various companies? A. Yes.

Q. Now, they were doing that for a period of time immediately [308] preceding the date when you began to do your business direct with the Firemen's Fund?

A. My recollection is it was all the time until we commenced with the Firemen's Fund.

Q. When you began to place your insurance direct with the Firemen's Fund, you only received Firemen's Fund policies? A. That is right.

Q. And were you not from 1910 and 1911 carrying \$25,000 on the "Nottingham"? A. I think so.

Q. You received from the Firemen's Fund two policies? A. Yes.

(Testimony of George F. Thorndyke.)

Q. One for \$19,000 and the other for \$6,000, being payable to the Globe Navigation Company \$19,000 and \$6,000 to the Trust Company of America?

A. Yes, sir.

Q. Where does the Trust Company of America have its main office?

A. I think in Cleveland, Ohio.

Q. Is that where you do business with it, Cleveland, Ohio? A. I think so.

Q. Is it with the Cleveland, Ohio, office that you hold communication?

A. I have very little communication with them.

Q. When you have communication and write them?

A. I think it is Cleveland, Ohio.

Q. Now, is it Cleveland, Ohio, or is it New York?

A. I cannot state. That business has been identified with two or three of these trust companies in the east, the Equitable and the Trust Company of America. [309]

Q. Now, I hand you Firemen's Fund Policy No. 103,010, which covered the "Nottingham" from April 20, 1910, to April 20, 1911, and call your attention to the fact that that policy of insurance for \$19,000 on a valuation of \$55,000—You are familiar with the policies involved in this litigation, are you not?

A. I am.

Q. Do you recollect what the valuation of the "Nottingham" is as placed in the policies in suit?

A. \$45,000.

Q. What was the occasion, under what circumstances did you secure a reduction in the valuation of

(Testimony of George F. Thorndyke.)

the "Nottingham" from \$55,000 in the policies of 1910 and 1911, to \$45,000 in the policies of 1911 and 1912?

A. My recollection is by taking out five thousand dollars additional insurance on the vessel they made the reduction in the insured value of the ship.

Q. When you placed this insurance through Johnson & Higgins who dictated the terms of the policies, yourself, or did Johnson & Higgins?

A. I think in dealing with the Firemen's Fund undoubtedly Johnson & Higgins, after conference with us.

Q. You were accepting their advice as expert insurance brokers? A. Naturally.

Q. Prior to 1908 you were covering your vessels with a partial loss insurance, were you not?

A. I do not remember.

Q. Well, do you recollect whether you ever had your vessels insured under partial loss policies?
[310]

A. I have, yes; have had them insured for five per cent average.

Q. By five per cent average you mean that five per cent of all partial losses or damages shall be assumed by the owner? A. By the owner.

Q. Do you recollect about the date that you began to take out only total loss insurance?

A. Well, I do not remember when we changed.

Q. Well, was it about 1908?

A. I am inclined to think it was earlier than that.

Q. Is there any difference in the rate of premium

(Testimony of George F. Thorndyke.)

that you were required to pay to the insurance companies for a partial loss policy and a total loss policy?

A. I do not remember.

Q. Cannot you recollect whether or not it would cost you any more to get policies that would cover total or partial losses than to get policies covering only total losses?

A. My judgment is that we paid less.

Q. For which?

A. We paid a less premium on the five per cent average than we are asked to pay now on total loss only.

Q. That was so you would have lower insurance?

A. I do not know.

Q. Did you make any inquiries as to comparative rates between partial loss insurance and total loss insurance? A. I do not recollect now.

Mr. CAMPBELL.—This is not cross-examination of what you have inquired of the witness, but if required I will make him my own witness for that purpose. [311]

Q. I would like to know whether or not you asked Mr. Cornfoot of the Albina Engine Works to bid on the repairs of any of your vessels within the last sixty days?

A. I do not remember asking him for any such.

Q. Did you write him asking him to submit a bid for doing certain work on some of your vessels in Portland? A. I did not.

Q. Did not you personally ask him to do so?

A. I did not.

(Testimony of George F. Thorndyke.)

Q. Did you discuss with him a bid which he had put in for repairs on one of your vessels?

A. I may have spoken to him about it.

Q. Did not you discuss a bid which he put in for the repairs which you were going to effect on this particular vessel that was in the port of Portland within the last sixty days?

A. Only to that extent, in the Speidel building, the day we were there, he asked if I got a letter from him about repairs on the "Nottingham" and I told him I had, and he asked if I had come to a decision yet, and I said no.

Q. Did you discuss with him his bid?

A. I do not recollect discussing it any further than I say.

Q. What did you do, send out a call for bids there in Portland on that vessel? A. No, I did not.

Q. Who did?

A. I wrote down to Marcus Talbot and asked him if he knew anybody that would undertake to clean the bottom. I will explain that we were taking the vessel on the dock at the Port of Portland and they do not do any repair work [312] on the dock, and I asked Talbot if he knew anybody that would be liable to want to work on the "Nottingham" when she was drydocked, and I wished he would speak to them and let me know what they would charge.

Q. Did you receive bids for that work?

A. We received bids from various people, amongst others I think was the Albina Engine Works.

Q. You discussed that with him, the question of

(Testimony of George F. Thorndyke.)

her repair on her arrival there?

A. It was the day we were in the Spaulding building, to the extent I tell you.

Redirect Examination.

Q. (Mr. BOGLE.) You say Johnson & Higgins were brokers?

A. Insurance brokers and marine adjusters.

Q. Marine insurance adjusters? A. Yes, sir.

Q. They have an office in Seattle?

A. Yes, the Colman building.

Q. Have had during all the years you have spoken of? A. Yes.

Q. You said that during the years 1910 and 1911 by taking out an extra five thousand dollars insurance you succeeded in getting the underwriters to agree to the valuation of \$45,000 instead of \$55,000, is that correct? A. That is my recollection, yes.

Q. You have stated heretofore that the vessel was worth not to exceed thirty thousand dollars. Why was she valued in these policies at \$45,000 and \$55,000 when she was only worth \$30,000? [313]

A. The Firemen's Fund Insurance Company required that valuation to be placed in the policies.

Q. (Mr. CAMPBELL.) You have to accept the valuations that the insurance companies place in the policies on these wooden vessels if you want their insurance? A. Yes, sir.

Q. These valuations are placed in there for insurance purposes?

A. I assume so. I wanted to buy insurance. They told me the best terms they would sell it for

(Testimony of George F. Thorndyke.)

and that was the requirement that they put, \$45,000 valuation in the policy.

Q. Is this the notice of abandonment that you gave in this case? A. It is, yes.

Q. Is this a copy of the letter that you received declining to accept the abandonment?

A. I think undoubtedly it is. Yes, sir.

Mr. CAMPBELL.—I offer these two letters in evidence, the notice of abandonment and the refusal of acceptance.

Papers marked Defendant's Exhibits 16 and 17 respectively, filed and returned herewith.

Q. Now, the letter refusing to accept the abandonment was signed by Mr. Taylor, was it not?

A. Yes, sir.

(Witness excused from the stand.) [314]

[Testimony of H. R. Clise, for Plaintiff.]

H. R. CLISE, being duly sworn, testified on behalf of the plaintiff as follows:

Q. (Mr. BOGLE.) Your name is H. R. Clise?

A. Yes, sir.

Q. You reside in Seattle? A. Yes, sir.

Q. You are an attorney at law? A. Yes, sir.

Q. One of the attorneys in this case?

A. Yes, sir.

Q. What is your relation to the Globe Navigation Company, and what has it been during the last five years?

A. I have been its general counsel during that time. I think I am probably a vice-president of the company.

(Testimony of George F. Thorndyke.)

Q. Are you a member of the board of directors?

A. I am not a member of the board of directors.

Q. Where is that company incorporated?

A. New Jersey.

Q. Seattle is its headquarters?

A. Seattle is its headquarters.

Q. You have general charge of its business out here in the way of looking after its board meetings and all of its general legal affairs as well as its administrative affairs?

A. I look after all its legal affairs and administrative affairs other than the actual operation of the vessels themselves, that is Mr. Thorndyke's business.

Q. I direct your attention to the allegation of the complaint in this case, that policy No. 103,834 issued by the defendant in favor of the Trust Company of America. [315] Who is the Trust Company of America?

A. That is a trust company holding certain of the bonds of the company.

Q. The Globe Navigation Company?

A. The Globe Navigation Company.

Q. Was this policy made in its name to protect it as trustee of the mortgage bonds? A. Yes, sir.

Q. Who has been its representative here looking after this policy and their interest in the property under that policy?

A. I have looked after all these matters.

Q. I call your attention to Defendant's Exhibit 16, which is the notice of abandonment. Was that

(Testimony of George F. Thorndyke.)

dictated by you or given under your direction?

A. That was given under my direction.

Q. At that time were you acting as representative and attorney of both the Globe Navigation Company and the Trust Company of America?

A. Yes, sir.

Q. Mr. Clise, after this vessel was brought into Astoria by one of the tugs owned by the Port of Portland, was there a libel suit brought against the "William Nottingham" in favor of the salvors?

A. Yes, sir, there was.

Q. Who were the parties to that suit?

A. The Port of Portland and the officers and crew of the tug "Wallula," they were libelants and the schooner "Nottingham" was respondent.

Q. Where was the schooner "Nottingham" lying at the time this libel was served? [316]

A. Astoria, Oregon.

Q. Was that before she had been relieved of the cargo? A. Yes, sir.

Q. Immediately after she had been brought in?

A. A certain number of days, not immediately; a certain number of days there.

Q. And the levy was made on the schooner "William Nottingham" at Astoria?

A. At Astoria, yes.

Q. What was the amount claimed in this libel for salvage?

A. Thirty thousand dollars, but the libelants reserved the right to offer proof upon this point as the truth may appear.

(Testimony of George F. Thorndyke.)

Q. You were notified of that libel, were you?

A. We were.

Q. Did you personally take charge of the interests of the "William Nottingham"?

A. I personally took charge of the interests of the "William Nottingham." I also brought up the underwriters, not by general appearance, but by authorization, we had their authorization; we consulted with them about everything.

Q. Did you notify the underwriters immediately after that libel was served? A. I did.

Q. And that was while the vessel was lying at Astoria? A. Yes, sir.

Q. What was your information as to whether the cargo could be discharged at Astoria or not, at that time?

A. Our information was that the cargo could not be discharged at Astoria. [317]

Mr. CAMPBELL.—I object as hearsay.

Q. Did you undertake, acting both for the Globe Navigation Company and the underwriters, to get the vessel brought to St. Johns, or Portland?

A. I did. I made written application to the United States Court at Portland, to have the vessel with her cargo on board removed from Astoria to St. Johns, Oregon.

Q. Prior to making the application to the Court, did you make any application to the proctors representing the libelants for a stipulation to that effect?

A. I did.

Q. With what result?

(Testimony of George F. Thorndyke.)

A. They refused to enter into that kind of a stipulation, and then I applied to the Court for the order, and there was a hearing had before the Court and argument made.

Q. Did you secure the order for the removal of the vessel? A. Yes, I did.

Q. On what conditions?

A. I secured an order from the Court to remove the vessel from Astoria to St. Johns, upon the condition that the expenses would be borne by the Globe Navigation Company; that The Globe Navigation Company would assume the risk incident to the removal.

Q. Did the Globe Navigation Company accept these conditions and secure the removal of the vessel? A. It did.

Q. The expense of that removal were all shown in your testimony in this case? A. Yes, sir.

Q. Personally you were not familiar with the expenses, the [318] total items of expenses?

A. Of the removal?

Q. Yes.

A. No, except in settlement with the Port of Portland for the salvage charges.

Q. Did you secure a settlement with the Port of Portland for this claim for salvage? A. I did.

Q. At what figure? A. Three thousand dollars.

Q. And was that sum paid? A. It was.

Q. By the Globe Navigation Company?

A. By the Globe Navigation Company and Underwriters together.

(Testimony of George F. Thorndyke.)

Q. By whom was it first paid to the libelants in the case?

A. The Globe Navigation Company paid it.

Q. And you were reimbursed to some extent by the underwriters? A. We were.

Q. And that is shown in the complaint, is it?

A. The items are shown in the complaint.

Q. Was the reimbursement made by the underwriters upon that particular item or upon the whole, or a part reimbursement or partial reimbursement on the total expense?

A. Reimbursement on the total expense incident to the libel.

Q. And the amount reimbursed by them is shown by the complaint in this case?

A. I think not.

Q. You show the credit there?

A. No, I do not show the credit.

Q. What is your understanding as to the amount you received? [319]

A. They have paid, as I understand, five-sixths of the expenditures which were made incident to the libel.

Q. Then, as I understand, the defendant has repaid the Globe Navigation Company five-sixths of all expenses incurred by them in connection with the salvage or settlement of this salvage suit, including expenses of taking the vessel to St. Johns, and the expenses in connection with it up to the time of the settlement of the salvage suit, about May 15th?

A. No, you are wrong there. The salvage suit

(Testimony of George F. Thorndyke.)

was on the 8th day of February, 1912, since which time—up to that time they paid five-sixths of the expenses in connection with this salvage operation, including the taking of the vessel from Astoria to St. Johns and the discharge of the cargo.

Mr. CAMPBELL.—That is hardly correct; the cargo contributed to that salvage, too.

Q. Can you, Mr. Clise, get the exact figures of the amount that you paid out in connection with the salvage and the expense of taking the vessel from Astoria up to St. Johns and the docking and the discharging, up to February 8th, the date you settled the salvage suit, and the amount that has been contributed by the defendant on these expenditures?

A. Well, the amount that was incurred in the salvage suit included the removing of the vessel from Astoria to St. Johns and the discharging of her cargo while there, is the amount stated in paragraph nine of my first cause of action, to wit, \$5971.07. But this amount does not include anything except the sum actually paid to the Port [320] of Portland at the time the libel suit was dismissed.

Q. Now, can you give us the exact amount you were paid by the underwriters on these items?

A. \$4975.72 and the owners paid \$995.15.

Q. Calling your attention to Plaintiff's Exhibit "J," state when that came into your possession.

A. That came into my possession either the day of its date or the day after, and it remained in my possession from that time until it was introduced in evidence in this case.

(Testimony of George F. Thorndyke.)

Q. Is there any other statement, Mr. Clise, that you want to make, in explanation of that report?

A. I wish to make this statement, so as to show that the word "unknown" referred to in Mr. Charles Page's testimony appeared as "unknown" in the duplicate original that was delivered to me at the time it was made by Mr. Walker, and that there has been no changes or alterations made in that respect.

Q. The report is in the identical shape now and when introduced in evidence as when delivered to you by Mr. Walker or Thorndyke, on the day it was signed or the day after? A. Yes, sir.

Q. (Mr. CAMPBELL.) You mean that the exhibit you have in your hand is now in the same condition that it was when delivered to you?

A. Yes, sir.

Q. (Mr. BOGLE.) Your company was the owner of the schooner "William Nottingham" at the time of the wreck in controversy [321] here?

A. It was.

Cross-examination.

Q. (Mr. CAMPBELL.) While the salvage case brought by the Port of Portland was up, you say that there was an understanding between yourself and the underwriters that that was to be without prejudice to the rights of any of the parties involved in this litigation? A. It was.

Q. And what ever occurred or was done in that matter was not in any way to be used or construed as an expression of the rights of either party involved

(Testimony of George F. Thorndyke.)

in this suit? A. That is correct.

Mr. BOGLE.—We concede that.

Q. Now, whatever the underwriters on the hull paid you or contributed, rather, to the salvage of the boat by the Port of Portland, and the expenses incident to the salvage was paid by them under admission at that time that they were liable under their policy for salvage charges?

A. So I understood.

Q. Whatever their proportionate share was?

A. Yes, sir.

Q. (Mr. BOGLE.) Did the underwriters *join* join with you in this guarantee against risk in removing the vessel from Astoria to St. Johns?

A. They did not.

Q. Did you ask them to do so? [322]

Q. (Mr. CAMPBELL.) You say when you came to settle this salvage case you were sent five thousand dollars from San Francisco? A. Yes, sir.

Q. And you sent back how much?

A. \$24.28.

Q. Who sent that money to you, Johnson & Higgins? A. Johnson & Higgins.

Q. It came to you from Johnson & Higgins?

A. It came to us from Johnson and Higgins, if that is the fact.

Q. You do not know what portion of the \$4975.82 was paid by the underwriters on the hull of the vessel, this defendant in this case and the owners of the cargo?

A. I do not know anything about that. That was

(Testimony of George F. Thorndyke.)

settled between the underwriters at San Francisco.

Q. The whole matter, so far as you were concerned, was in the hands of Johnson & Higgins representing you, was it not, that is the collecting of the money from the underwriters?

A. No, I did not understand anything of the kind, but Johnson & Higgins were fully conversant with the matters, and sometimes we would telegraph Johnson & Higgins and sometimes we would telegraph the Firemen's Fund.

Q. You do not mean to say that the Fireman's Fund put up all of the \$4975.72?

A. I did not say that, for I do not know who put it up.

Q. Included in that is whatever is the cargo's proportion? A. I suppose there is.

Q. That is to say, as you figure it out, one-sixth of the salvage was to be borne by the owners of the vessel and [323] five-sixths by the underwriters of the vessel and the cargo interests?

A. Yes, that is right.

Q. (Mr. BOGLE.) Mr. Clise, after the bids for the repair of the "William Nottingham" were received and examined by the manager, Mr. Thorndyke, on behalf of the Globe Navigation Company, did he make any report to you on these various bids?

A. Yes, sir.

Q. In writing? A. It was.

Q. Will you please look at the document I now hand you and state if that is the report he made to you.

(Testimony of George F. Thorndyke.)

A. That is the report that was made to me at that time.

Mr. BOGLE.—I offer this in evidence.

Mr. CAMPBELL.—I object, it is a mere self-serving declaration.

Q. That was made the date it bears, March 12, 1912? A. It was.

Paper marked Plaintiff's Exhibit "P," filed and returned herewith.

Q. (Mr. CAMPBELL.) Did you know of the existence of that letter at the time you were in Portland taking Mr. Mackintosh's deposition?

A. Yes, sir.

Q. You had it in your possession at that time, did you? A. I think I did.

Mr. CAMPBELL.—I make the further objection to it on the ground that the statements therein made by Mr. Thorndyke are [324] hearsay.

(Witness excused.)

Recess taken until 2 P. M. September 3, 1913.
[325]

Seattle, Washington, September 3, 1913.

Present: Mr. CLISE and Mr. BOGLE, for the Plaintiff.

Mr. CAMPBELL, for the Defendant.

IT IS HEREBY STIPULATED by and between the proctors for the respective parties hereto, that the following work was not necessary to restore the schooner "Nottingham" to the same condition that she was in prior to the disaster which she met after leaving the port of Astoria on October 2d, 1911.

1. It was not necessary to cork the bottom from

the third plank below the light-load line down, except as provided in the original specifications. It is further stipulated that the foregoing admissions as to bottom corking and removal of shoe shall not be taken as an admission by either party of the necessity or non-necessity of other repairs of the vessel.

2. That it was not necessary to remove any portion of the shoe except that provided in the original specifications.

3. It is further stipulated that the cost of resalting the vessel is \$——.

4. It is further stipulated that on April 15, 1912, proctor for the libelant made a give or take offer for the "Nottingham" of five thousand dollars, said offer being without prejudice to the rights of either party in the pending litigation. [326]

**[Testimony of Frank Walker, for Plaintiff
(Recalled).]**

FRANK WALKER, recalled on behalf of the plaintiff, testified as follows:

Q. (Mr. CLISE.) Referring to Plaintiff's Exhibit "J," which is your supplemental report of survey dated March 4th, 1912, Mr. Page, one of the witnesses for the defendant, testified that the word "unknown," which is the second word in the eighth line, appeared in the paper which he had, which was a copy made by someone in his office, appeared as "known." Will you state how this word, which appears in this exhibit as "unknown" appeared in your original notes and in all copies of this report furnished by you?

A. It appears "unknown" in all copies furnished

(Testimony of Frank Walker.)

by me in the original report and all copies that I furnished.

Q. So that if the error occurred in anybody's copy, are you able to explain it?

A. No, I am not. It might be a typographical error on the part of the stenographer.

Q. Now, again referring to this same exhibit. What was the reason for this supplemental report of survey being made?

A. The reason of that survey report being made, I think I explained before, was because that in making this survey of the vessel, these items—that Captain Crow, the underwriters' surveyor, would not agree with, and rather than have any dispute in the specifications, I only drew up the first specifications to comply with everything that was agreed upon.

Q. Am I to understand then that you considered the items contained in the supplemental report as necessary, notwithstanding Captain Crow's disagreement? [327]

A. I considered them necessary, yes, sir.

Q. Now, I call your attention to the fact that this vessel was supposed to be restored to the same condition that she was prior to her leaving Westport on this voyage in October, in order to determine whether or not there was a constructive total loss under the terms of the policy, and that it was necessary that the vessel should be placed in that condition. Now, when you came to actually repair a vessel, is it usual that in the first survey that you

(Testimony of Frank Walker.)

make, and the specifications that you prepare, that you include everything that the actual repair of a vessel shows to be necessary?

A. Oh, no. In many cases, in the majority of cases, we have to draw up a supplementary report of survey, for the simple reason that a great deal shows up in the actual carrying out of the work that cannot be seen at the time of the first survey, or the extent of it cannot be determined.

Q. And under the peculiar conditions governing this case, as the actual repairs were not being made, was this supplementary survey to include everything that in your opinion you deemed necessary to restore the vessel to her original condition?

Mr. CAMPBELL.—I object to the question for the reason that it assumes a condition of fact that does not appear in the record as having existed, to wit: The peculiar conditions of this case. And, on the further ground that the evidence shows that a thorough examination was made of the vessel and specifications were drawn, covering them.

A. Yes, sir. [328]

Q. Now, Mr. Walker, are you acquainted with the actual construction of the “Nottingham”?

A. Yes, sir.

Q. Do you know when and where she was being built?

A. I do not know the date she was being built. I saw her being built, on many occasions.

Q. Where was she built?

A. Built at Ballard.

(Testimony of Frank Walker.)

Q. A suburb of Seattle?

A. A suburb of Seattle.

Q. Will you explain to the Court, then, the actual construction of the water-closet, especially with reference to the liability of her taking water through the lead pipe leading down from the closet to the outside of the vessel?

A. The vessel, where the water-closet pipe leads through is filled solid between the cants, and the water-closet pipes pass through solid wood, and is flanged over on the outside.

Q. All the way it passes through—

A. All the way it passes through solid wood, and it is flanged on the outside.

Q. If this pipe was not there at all, would any leakage occur from the outside?

A. If the pipe only entered the solid wood and did not pass right through, there would be practically no leakage.

Q. How far above the water is the opening of the water-closet pipe, when the vessel is in salt water?

A. Loaded?

Q. Yes.

A. When the vessel is fully loaded the pipe is above the [329] water at all times.

Q. If she was loaded to the 19-foot mark, can you state how far the pipe would be above the water?

A. The pipe was somewhere near the 21-foot mark. It would be 12 or 15 inches above the water.

Q. Now, will you explain to the Court the construction of the vessel at the stern post, so that if

(Testimony of Frank Walker.)

in this corking that Captain Gibbs has testified concerning, there was no oakum whatsoever, would it be possible for water to enter the vessel at all or in any quantity?

A. There might be a slight leakage, and it depends on the fitting of the planks, where the planks fit up on the rabbit of the deadwood, it is wood to wood, and if the planks fit on that rabbit perfectly tight, no water can get in, regardless of oakum or not.

Q. Do you know how that does actually fit on the "Nottingham"?

A. It is very good, it fits very good. It was good work throughout the "Nottingham" when she was built.

Q. I believe you have already testified there was no oakum in that seam when you examined it in December, have you not?

A. I do not think I have testified. I do not remember that the question was asked.

Q. Did you ever examine this crack that Captain Gibbs has testified about? A. The water-closet?

Q. The stern post?

A. The seam in the hood ends?

Q. Yes, sir.

A. Yes, sir, I examined that very carefully with Captain Crow. [330]

Q. When?

A. On the drydock, I think, in December, when I first made the specifications with Captain Crow.

Q. Well, if the vessel was on the drydock at St. Johns about the 11th of December, is that the

(Testimony of Frank Walker.)

time when you examined her?

A. My survey report will give the exact date. I do not know the date.

Q. Look at your report and state what date it was.

A. December 21st.

Q. December 21st, 1911? A. Yes, sir.

Q. That is the time when you examined it with Captain Crow? A. Yes, sir.

Q. Referring to this seam near the stern post, will you describe the condition you found it in when you examined it with Captain Crow?

A. Yes. When I examined it with Captain Crow, the cement had been scraped out or the cement had fallen out, but the seam was full of oakum and all the seams around there were full of oakum. I climbed a ladder with Captain Crow, he hung on the rudder while I climbed, and I shoved a knife in the seam, and I found the oakum slightly slack. I could shove the blade of my knife in between the oakum and the wood.

Q. How wide was this seam?

A. The seam was an ordinary seam, perhaps three-eighths of an inch wide.

Q. How long?

A. The seam ran up and down the hood ends, the end of the plank. [331]

Q. How long was this where you found the oakum slightly displaced? A. Oh, about six inches.

Q. In the condition that the seam was in at the time you saw it in December, would it have been possible for any quantity of water to pass through that

(Testimony of Frank Walker.)

opening into the vessel?

A. Absolutely no; very little water could pass in, if any.

Q. In your original examination you testified that you saw the vessel a few days after she arrived at Astoria? A. Yes, sir.

Q. And you continued to be acquainted with and to survey and examine the "Nottingham" for six months thereafter? A. Yes, sir.

Q. Were you able from this investigation to arrive at any fact that would indicate how the water actually got into the "Nottingham" after leaving Astoria?

A. The only way that I could account for the water getting in the ship was through the hatches.

Q. By reason of the vessel having taken water in a more or less unknown manner, and by reason of the heavy weather and severe straining through which the "Nottingham" went in the storms after leaving Astoria, in preparing your reports and specifications, was it necessary to take any extra precautions to make good this strain or to prevent the like of this occurring again?

Mr. CAMPBELL.—I object, the specifications speak for themselves, and the agreement as to the work that was necessary to be done.

A. Yes, I considered it necessary to take every precaution. [332]

Cross-examination.

Q. (Mr. CAMPBELL.) You say that the only way that you could account for the "Nottingham"

(Testimony of Frank Walker.)

having gotten water into her after you had made a thorough examination at Astoria and at the dock, was through the hatches? A. Yes, sir.

Q. You found no other places of leakage that would account for that water getting in the vessel?

A. Not any place that would allow any quantity of water to get in.

Q. Now, how did you happen to be so carefully watching the construction of the "Nottingham" during her building, were you the surveyor in charge? A. I was the company's surveyor.

Q. At that time? A. Yes, sir.

Q. Did you have charge of her construction?

A. No.

Q. You do not mean to say that this toilet closet pipe, or the space through which the toilet closet pipe passes from the closet itself to the outside of the planking is water tight, so that water would not go in from the flange?

A. From the inside of the ceiling to the outside of the planking is solid wood, and the space up above the ceiling up under the deck is the pipe itself.

Q. Was there a solid piece of wood put in between the ceiling and the planking? A. Yes, sir.

Q. And this pipe passes through that?

A. Passes through solid deadwood. [333]

Q. Was that wood corked between this particular piece of deadwood, corked between the outside plank and between the ceiling?

A. It is snugly fitted.

Q. I ask if it was corked.

(Testimony of Frank Walker.)

A. No. The outside plank is corked.

Q. The space between the deadwood and the ceiling and the plank are not corked?

A. No.

Q. If the planking is fastened so tightly on to the stern post of vessels, and this one in particular, why is it that you are so careful to cork the hood ends of the plank? A. That is an extra precaution.

Q. It is put there for the purpose of preventing a leakage? A. Yes, sir.

Q. And it is always done on every wooden vessel?

A. It is always done on every wooden vessel.

Q. I understood you to testify on your first examination that you made no inspection of this vessel from the time you drew up the original specifications and the supplemental report?

A. My testimony will show that, I do not know.

Q. You do not care to change your testimony in that particular? A. No.

Redirect Examination.

Q. (Mr. CLISE.) I understood you to testify that the supplemental report was based upon the examination that you made of the vessel at the time that you made the examination [334] with Captain Crow? A. Yes, sir.

Q. And that it was supplemental and contained matters to which Captain Crow did not agree, and which you, in your opinion, considered necessary?

Mr. CAMPBELL.—I object as leading.

A. Yes, sir. It contained matters that we did not agree upon, and at the same time they were so in-

(Testimony of Frank Walker.)

sistent upon some of these items that were necessary to be done, although they would not agree to them. In this first specification Captain Crow was insisting these items were necessary as well as myself.

Mr. CAMPBELL.—I move to strike the answer as being a conversation with a deceased person.

Q. Mr. Walker, if the repairs had been made in conformity with the bids of William Cornfoot or the St. Johns Shipbuilding Company, would it have been necessary to have had the same inspected during the construction of the work? A. Yes, sir.

Q. What would have been a reasonable charge for such inspection?

A. Ten to fifteen dollars a day.

Q. (Mr. CAMPBELL.) That is, inspected by the owner?

A. Inspected by someone for the owner.

Q. And you would charge ten or fifteen dollars a day? A. I should charge a great deal more.

Q. How much would you have charged?

A. Twenty-five dollars a day and expenses.

Q. (Mr. BOGLE.) Is it customary, Mr. Walker, for owners to [335] have an inspector present where work of that character is done under contract?

A. Yes, in every case it is customary to have their representative there.

(Witness excused.) [336]

[Testimony of George F. Thorndyke, for Plaintiff.]

GEORGE F. THORNDYKE, recalled on behalf of the plaintiff, testified as follows:

Q. (Mr. CLISE.) Mr. Thorndyke, you were requested yesterday to prepare a list of all expenses which the Globe Navigation Company incurred, incident to the detention of the "Nottingham" at St. Johns, all items not included in the adjustment. Have you prepared such a list? A. I have.

Q. Is it in writing? A. Yes, sir.

Q. Have you the same with you? A. I have.

Q. The paper I hand you contains that list?

A. Yes, sir, it does.

Mr. CLISE.—We offer it in evidence.

Mr. CAMPBELL.—I object as immaterial for the reason that, so far as the statement discloses any other items going to the cost of repairs of the vessel is to be taken into consideration in computing the necessary amount to constitute a constructive total loss under the policy, and that they are neither general average charges nor salvage charges.

Paper marked Plaintiff's Exhibit "Q," filed and returned herewith.

Cross-examination.

Q. (Mr. CAMPBELL.) Now, did you hand an account of these expenses to Johnson & Higgins, whom you employed to make up this general average statement? A. I do not know. [337]

Q. Why don't you know?

A. These are items that may have occurred since we put in our statement to Johnson & Higgins.

(Testimony of George F. Thorndyke.)

Q. When was this adjustment completed?

A. I think sometime in April.

Q. Now, that first item, \$163.70, was expended before the adjustment was completed?

A. Yes, sir.

Q. Did you hand that to Johnson & Higgins?

A. I do not remember.

Q. Do you remember whether they rejected that as a general average demand?

A. I never had any notice that they had rejected it. I do not recollect.

Q. You sent to them all that you considered should properly go into the general average, didn't you?

A. We aimed to send all the expenses and leave them to judge what should go into the general average or particular average. There are items, however, that we failed to do that with.

Q. Did you send these for them to judge of them?

A. I do not remember whether I did or not.

Q. Now, what was that trip for?

A. Consulting the Firemen's Fund in San Francisco, and Laboyteaux.

Q. What about?

A. In connection with the "Nottingham."

Q. What was it you were going to counsel with them about on February 17?

A. I do not remember now, except I know it was in connection [338] with the "Nottingham," when the expenditure was incurred.

Q. You were down there on a trip to settle this

(Testimony of George F. Thorndyke.)

claim with the Firemen's Fund?

A. I do not remember.

Q. Do not remember anything about what expense was for? A. No.

Q. What were you doing nine days in San Francisco?

A. Five days in San Francisco and four days on the road.

Q. What were you doing during those five days?

A. We were consulting with Mr. Levinson and Johnson & Higgins, and awaiting the receipt of telegrams on matters that they were putting up to others or that we might have been putting up to others.

Q. What were these matters?

A. Negotiations in connection with the "Nottingham."

Q. What were the negotiations?

A. Various things in connection with the difficulties that the "Nottingham" was in.

Q. Now, give me a frank answer, don't evade it. You say they were for expenses during the period of negotiations, now what were the negotiations for?

A. Settlement of this loss with the Firemen's Fund?

A. It might have been. I do not remember.

Q. What did Johnson & Higgins have to do with it? A. They were our adjusters.

Q. Consulting them about items that should go into the general average?

(Testimony of George F. Thorndyke.)

A. I told you I did not remember all that was there. I know we made a trip to San Francisco.

Q. Can't you tell me a single thing you did during the [339] five days you were in San Francisco and four days on the trip?

A. Yes, I consulted as to things about the "Nottingham" disaster; that was the only thing I was in San Francisco for.

Q. Name me one thing you consulted with anybody about?

A. I would not attempt to say at this time. We had the matter of settlement, the whole adjustment of this case up with Levinson in San Francisco, and we made two trips there. Whether that was the time we had it up in connection with the whole case or the next time I do not know.

Q. Where are the expenses of your trip?

A. I do not know.

Q. You handed them in to Johnson & Higgins, didn't you? A. The adjustment will show.

Q. Don't you recollect?

A. I do not know but I submitted both of them to Johnson & Higgins.

Q. If they had they repudiated these as a general average charge?

A. It has not been paid to us; that is an incurred expenditure and has not been paid to us; we have not recovered for it. It stands on our books unpaid, and it is in connection with the "Nottingham."

Q. Is it not a fact you went to San Francisco in an effort to induce Levinson representing the Firemen's

(Testimony of George F. Thorndyke.)

Fund to pay the loss under the policies?

A. I do not think we ever asked Levinson to pay the losses on the policies. [340]

Q. You never made demand on them to pay the losses on the policies?

A. Not in the way you are now putting the question.

Q. What were you doing down there?

A. I told you that I was there in connection with the business of the Globe Navigation company on the "William Nottingham."

Q. That is very general in its terms. Cannot you give me one specific piece of business that you went there for?

A. Why yes, I suppose we were there to get an adjustment of the whole case of the "William Nottingham."

Q. When you mention an adjustment of the whole case you mean a settlement of the insurance?

A. We naturally wanted a settlement of the insurance, and I suppose we discussed that with him.

Q. Don't beat around the bush. Answer frankly, was it not for the purpose of settling the insurance?

A. I do not recollect, Mr. Campbell.

Q. Now the next item, \$24.28 Johnson & Higgins balance account, our one-sixth.

A. When the minutes came from San Francisco, came to pay the Port of Portland claim against the "Nottingham" for their portion, the portion they agreed to pay, it exceeded their portion was \$24.28,

(Testimony of George F. Thorndyke.)

and we received the full amount and we returned \$24.28 to them.

Q. To whom?

A. Johnson & Higgins, to be given the underwriters.

Q. This \$24.28 was money you received from San Francisco and you sent it back to San Francisco, to Johnson & Higgins? [341]

Mr. CLISE.—We consent that that item be stricken.

A. Yes, sir.

Q. Now, what are these expenses of yourself to Portland on May 4, 5, and 6th?

A. They are all in connection with the "Nottingham"

Q. I suppose so or you would not have handed them in. But what were they for? Was not that an expense that you incurred when you went to Portland in an effort to settle this case with Mr. Page and Captain Crow and Captain Gibbs and Mr. Walker? A. No.

Q. It was not? Well, what was it for?

A. I think it was probably at the time we went over and made a survey. I went along.

Q. Well, was not that the purpose you went down there for?

A. It was in connection with the "Nottingham," the complications surrounding the "Nottingham."

Q. Endeavoring to reach a settlement with the Firemen's Fund, was it not?

A. Well, I did not consult with the Firemen's

(Testimony of George F. Thorndyke.)

Fund, he was their surveyor.

Q. Was not Page representing the Firemen's Fund?

A. In taking up data, there was nothing in connection with the settlement.

Q. You discussed the matter with Page, didn't you? A. Settlement?

Q. Settlement of the case?

A. No, I did not discuss a settlement of the case with Page in my life.

Q. Did not this trip to Portland occur after the night [342] conference we had in Mr. Clise's office when you people were trying to adjust a difference between Captain Crow and the two surveyors? Was not the trip made immediately following the conference in Clise's office where we were trying to adjust the loss with the Firemen's Fund?

A. Well, we went down for the purpose of having Captain Gibbs and Mr. Walker take up the difference between Captain Crow and Mr. Walker.

Q. Did you hand that item in to Johnson & Higgins to pass upon for the general average?

A. I do not remember.

Q. Well, if you did, they rejected it, didn't they?

A. I have no notice of their rejection.

Q. Well, you see it is not in the general average adjustment? A. I do not know whether it is.

Q. Why did you hand this statement in, with the preliminary statement that these items are not contained in the general average adjustment?

A. I will withdraw that answer. I know it is not

(Testimony of George F. Thorndyke.)

in the adjustment. These items appeared on the books and we have not been reimbursed.

Q. You want to get the money back from somebody? A. Yes, sir, the underwriters.

Q. If you had considered it a general average matter you would have handed it in to Johnson & Higgins for adjustment, would you not?

A. But I never seek to decide these matters.

Q. Did not you hand it in to them for their consideration? [343]

A. I am to hand everything that we know to exist in the way of expenditures.

Q. How long were you in Portland that trip?

A. It states here trip included May 4th, 5th and 6th.

Q. What is the fare over to Portland?

A. Seven dollars and sixty cents including berth.

Q. That is fifteen dollars for the round trip, and you were there one day, were you not?

A. I was there the 4th, 5th and 6th.

Q. You were in conference with the Firemen's Fund representative one day, were you not?

A. I do not remember that.

Q. Don't you remember our meeting you in the morning and going down to the vessel and our leaving for San Francisco that night, and your returning home?

A. No, I don't think I came back that night.

Q. What did you stay there for?

A. I do not remember now.

Q. Did Mr. Walker accompany you?

(Testimony of George F. Thorndyke.)

A. I think he went over with me. I do not remember whether we came back together or not.

Q. Where are his expenses that you paid for him on that trip?

A. I do not know. I guess they are in his bill of seven hundred and fifty dollars.

Q. In the general average? A. Yes.

Q. They were included in the bill he rendered that you sent to San Francisco to Johnson & Higgins for their consideration in the general average?

A. Yes, he has an item of \$750.

Q. Which includes this service and this expense?
[344]

A. Yes.

Mr. CLISE.—Do you know?

Mr. CAMPBELL.—I object to counsel interfering with the witness while I am cross-examining.

Q. If you sent Walker's bill, expenses, down to Johnson & Higgins for their consideration as to whether they should go in the general average, why didn't you send this one down?

A. I do not know unless it is an omission on my part.

Q. You do not remember whether you did or did not, do you?

A. I do not know. Johnson & Higgins may have had that bill. It has not been paid and has not been allowed.

Q. At that time the cargo was all out of the vessel and the salvage charges were paid and disposed of, were they not?

(Testimony of George F. Thorndyke.)

A. Yes, the vessel was lying there.

Q. The vessel was lying at the Port of Portland, was she not? A. At St. Johns.

Q. And all that remained unsettled between you and the Firemen's Fund was the question as to whether or not they were liable on their policies for the total loss of the vessel. Is not that true?

A. I suppose that is true.

Q. Well, is it not true?

A. I do not know.

Q. Was not the cargo out of her and all disposed of?

A. The cargo was discharged from her before she was drydocked and put in storage there.

Q. Turned back to the owners; the owners had taken [345] the cargo over? A. Yes, sir.

Q. You had settled the salvage claims with the Port of Portland?

A. Yes, we had settled the salvage claims with the Port of Portland.

Q. And all that remained was the dispute between the Firemen's Fund and yourselves as to the question of the loss under the policy for constructive total loss of the vessel?

A. I do not know as to that.

Q. What else remained?

A. I do not know what may have remained.

Q. You are manager of this company are you not?

A. Yes, sir.

Q. Cannot you remember? A. No.

Q. Why cannot you remember?

(Testimony of George F. Thorndyke.)

A. Well, because I have not looked up that particular part, looked into that particular question as to whether there was some outlying matters in connection with that case aside from our claim against the Underwriters for the whole policy. There were many other things, doubtless there were other things besides the whole policy matter.

Q. Did you have these items up with the Firemen's Fund as to whether they should pay them or not?

A. I do not know. They have not been paid. We have not recovered them.

Q. Now, your suggestion then that possibly these items were up for discussion, was simply a momentary thought at [346] just the moment, was it not?

A. Naturally, I am thinking now what we are talking about.

Q. You are not basing your answer on a recollection of what the particular items were for?

A. No, only that I know that I am here testifying these items were incurred on account of the disaster to the "Nottingham" in October, 1911.

Q. They were not items for repairs, were they?

A. No.

Q. Is it not a fact that all that remained at that time was the question whether or not the Firemen's Fund was liable to you under their policies?

A. No more so than it is today a question.

Q. Admitting that, was it not at that time the question that remained between you?

(Testimony of George F. Thorndyke.)

A. Well, I can only say that it is my opinion the Firemen's Fund is liable to us for the face of the policies and the expenses that I have incurred.

Q. That does not enlighten us any. That was the purpose of towing her from Astoria to St. Johns, but the trip was for the purpose of finding out what her repairs would cost so as to ascertain whether or not you had a claim against the Firemen's Fund, was it not?

A. Why, I don't remember. I think the towing of the vessel to St. Johns was done for the best interest of all concerned.

Q. We admit that. But, admitting that now, was not the purpose of it to enable you to ascertain the extent of the damage to the "Nottingham" and the cost of repairs so as to further ascertain whether you had a loss under [347] policies?

A. Naturally we had to take the vessel and dock her in order to learn the extent of her damages.

Q. Was not that the purpose of doing that?

A. Certainly.

Q. So as to ascertain whether you had a loss under your policies?

A. No, I do not know that we went into the thing to that extent, Mr. Campbell, at that time.

Q. Now, don't you know, Mr. Thorndyke, that that was the purpose, to enable you to ascertain whether you had a loss under your policy or not?

A. No, I don't know that that was; the first thing in my mind we wanted to get the vessel up there and survey her and see the extent of the damage.

(Testimony of George F. Thorndyke.)

Q. For what purpose?

A. The purpose was—it was agreed and desired by all concerned that that should be done.

Q. For what purpose?

A. I supposed the purpose was to see if the vessel was in and to see if it was a total loss.

Q. Under her policies? A. Yes.

Q. And it was for the purpose of ascertaining whether or not you had a claim under your policies against the Firemen's Fund? A. Naturally.

Q. Now, your next item, \$4.05 is for coal oil. When was that expended?

A. That was expended while she was at St. Johns.
[348]

Q. She was at St. Johns nearly nine months of the time during that period.

A. It was prior to July 1st.

Q. Subsequent to May 4th?

A. Prior to July 1st, 1912.

Q. She went to St. Johns the first of December?

A. Yes, sir.

Q. What time in that interim was it?

A. I should judge it might have been in April or May.

Q. After the cargo was out of her?

A. It might have been incurred in June.

Q. After the cargo was out of her? A. Likely.

Q. And the salvage charges all paid to the Port of Portland? A. That is likely.

Q. Why was it you did not put down on this bill

(Testimony of George F. Thorndyke.)

the date of that expenditure when you itemized the others?

A. There was no reason, for you stated yesterday that you did not require receipts, that if I stated that the bill was incurred you would be satisfied, and I did not put the date down here because I did not know that it would be required.

Q. I do not question, Mr. Thorndyke, your word, when you say you spent a certain amount of money. But I ask you now as to the time you spent it.

A. I cannot tell without recourse to the vouchers.

Mr. BOGLE.—We can produce the vouchers. We understood as the witness did that counsel did not want the vouchers or the details. That is the reason I did not ask the witness to have them. If you desire them we will produce them. [349]

Mr. CAMPBELL.—I would like to know the date and what the coal oil was for.

Q. What was this long distance telephone in May?

A. I had that the other day. I did not know that you wanted it. I was telephoning to of Brown & McCabe to reach the captain, we wanted to consult the captain.

Q. Was the captain on board the "Nottingham" in May?

A. No. Maybe I wanted the watchman.

Q. Did you have a watchman employed on the "Nottingham" in May?

A. Yes, we had a man supposed to be looking after the "Nottingham" in May.

Q. You cannot recall what that was for?

(Testimony of George F. Thorndyke.)

A. I do not recollect what it was for.

Q. You do not know whether it was a telephone to look up—

A. I looked it up before, it was Brown & McCabe, something in connection with the “Nottingham.”

Q. They are stevedores in Portland?

A. Yes, sir. I had no other business in Portland at that time.

Q. What was this telegram?

A. I can get vouchers for that and show you. I do not remember.

Q. Do you recollect what it was about?

A. No, I certainly do not, but it would not be in there unless it was in connection with the “Nottingham.”

Q. What is the next item?

A. The next item is salary F. P. Harlow, watchman, June 18th to June 30th, inclusive, \$32.50.

Q. Where are the expenditures for the watchman prior to June 18th? [350]

A. There were none.

Q. You did not have any?

A. We did not have any for watchman, not until the time Harlow was watchman. The other watchman got drunk, and I did not think he was entitled to any pay and did not allow him any. He was derelict in his duty and I did not think he was entitled to any pay and I did not allow him any.

Q. What time?

A. I think it was May and June.

Q. Because he was drunk during that period you

(Testimony of George F. Thorndyke.)

did not allow him anything for his salary?

A. He was derelict, I should say, I will change that from drunk.

Q. He was on duty between the 18th and 30th of June?

A. He was not. He was on until I sent Harlow down from Seattle there was no watchman on the vessel. And this man that had been appointed as watchman was derelict in his duty and was not watching the vessel and I sent a man down from here to take his place, and he never had the nerve to put in a bill for services.

Q. And this man that you sent down, this man Harlow is the man you sent down?

A. Yes, I sent him down from here.

Q. June 18th? A. Yes.

Q. At that time the only remaining dispute between you and the Firemen's Fund was as to their liability under their policies, was it not?

A. I must admit that this is a little too deep for me. I do not know whether that is a fact or not.

[351]

Q. You are manager of this company?

A. Yes, sir. I know we were claiming the amount of our policies and expenses incurred. Whether or not at that time there were other things beside the policies, the face of the policies, outlying, I do not know.

Q. Did the fireman's Fund Insurance Company authorize you to employ a watchman? A. No.

Q. You never did consult with them about that,

(Testimony of George F. Thorndyke.)

did you? A. No.

Q. You never told them that you had a watchman?

A. No, I never discussed the matter with the Firemen's Fund.

Q. What was the expense of cleaning up the ship? When were these incurred?

A. As soon as Harlow went aboard.

Q. About the 18th of June? A. Yes.

Q. What do you mean by cleaning the ship?

A. The cabins where he had to be domiciled, up to that date, the cabins had never been cleaned. There was a lot of flour and paste and stuff on the decks, and it was in an unsanitary condition. The state-rooms were in an unsanitary condition, and so he decided to get some men to put them in order so that he could live aboard the vessel.

Q. You did not consult with the Firemen's Fund about that? A. No.

Q. They did not know the cause of your doing it?

A. No, we went ahead and did it ourselves.

Q. You paid \$16.60 for the purpose of cleaning out the cabin so that he might live in it? [352]

A. Well, not only the cabin but the galley and the sleeping quarters and the living quarters of the vessel and pantry.

Q. Where he was living?

A. Where he was living, yes. He had his family aboard with him, and he had to put them in shape to live there.

Q. Who was it that told you that Mr. McIntosh was the man who fell down on the repairs of the

(Testimony of George F. Thorndyke.)

“Beachley,” which you communicated to Mr. Clise some three months after the original specifications were put in and the bids rendered?

A. I do not remember now who I consulted with.

Q. I suppose that it is correct that you did not get any confirmation of that report?

A. Since that, I would state recently that I found that whoever informed me about that might have been mistaken, for the reason that I understand that Mackintosh did not have the contract on the “Beachley.”

Mr. CAMPBELL.—Now, Mr. Clise, for the purpose of saving the taking of depositions in Portland, will you admit that Mr. Mackintosh had nothing to do with the “Beachley,” that the contractor who fell down on the job was a man named Kelley, acting under the name of the Puget Sound Ship Building Company?

Mr. CLISE.—Yes, sir.

Q. So that this reflection you had in this letter based upon the “Beachley” was entirely unfounded?

A. I understand that the fact as given me was unfounded, but I had the information in the way I communicated it to Mr. Clise.

Q. But you say you did not attempt to confirm it by any one in authority? [353]

A. I suppose not, seeing that I did not go to Mackintosh and ask him if he fell down on that contract.

Q. You did not make any inquiry of anybody else that knew, did you? A. I do not remember now.

Q. You admit now that you were entirely wrong?

(Testimony of George F. Thorndyke.)

A. I admit my informant must have been wrong, for I understand that Mackintosh had no contract on the "Beachley," and a man named Kelley did have.

Q. You testified yesterday that in consideration of the consent of the insurance company to reduce the insured valuation from \$55,000 to \$45,000 you took out insurance on the "Nottingham" in the sum of thirty thousand dollars, did you not?

A. That is as I remember it.

Q. Now, was there any difference in the value of the "Nottingham" between the date of her loss and damage in October and the April following?

A. Why, naturally a vessel deteriorates.

Q. If she had been in sound condition, would she have been worth practically the same amount of money in April, 1912, that she was in October, 1911?

A. If she had been in sound condition in April, 1912, she would have been worth more money than she was in October, 1911.

Q. In wrecked condition?

A. I said in sound condition.

Q. She would have been? A. Why, certainly.

Q. Now would she have been worth more in October, 1911, than she was in April, 1911? [354]

A. Yes, the things to work with, the machines to work with. I think she would have been worth more money.

Q. With what?

A. As an implement to work with. Rates and conditions, as I remember, were better in October than in February.

(Testimony of George F. Thorndyke.)

Q. Then you would consider her value in October, 1911, more than in April, 1911?

A. In sound condition, yes.

Q. In sound condition?

A. As I remember it.

Q. And from October, 1911, onward into the summer of 1912, the fall of 1912, vessel property was gradually going up, was it not?

A. I think so, yes.

Q. Then in December and January, 1911, and 1912, she would have been worth more in sound condition than she was in October?

A. I do not remember. I think things commenced to turn about that time. There was a period when rates advanced very materially and vessels were worth more than at low rates.

Q. Is it not a fact that freights began to go up in the fall of 1911 and continued to go up through the winter and spring and into the summer?

A. I do not know that that extended into the summer, Mr. Campbell. I think regarding the winter and spring is all right. I guess that the rates did continue up in the summer time.

Q. Then the rates were increasing from the fall of 1911 on up into the summer of 1912?

A. Yes, sir, I think so. [355]

Q. Then the vessel was worth more in December and January than she was in the fall of the year, in October, was she not? A. What year?

A. 1911—1912 we are speaking of. December, 1911, and January, 1912. It was gradually increas-

(Testimony of George F. Thorndyke.)

ing and would gradually increase in value if she had been in sound condition?

A. Yes, sir, she should. She ought to.

Q. Not only ought to but she would as a matter of fact, if she had been in sound condition?

A. Well, it depends on her position and all about it. There are a good many things to depend on. If she was in Australia or where the rates were not available, it would be different than if she was here on this coast. If she was here and in sound condition it ought to have been more, and naturally would have been in October than in April, 1911.

Q. Notwithstanding, then, in April, 1911, when you took out this insurance with the Firemen's Fund—

A. No, I will change that, in October, 1911.

Q. What is it that caused you to change your former statement?

A. That is two years ago. I am just trying to recollect the conditions, that is all, as they existed. I guess that she would have been worth more money in October than she would have been in April of that same year.

Q. And from that time on until the next summer she would have gradually increased in value as the rates continued to go up?

A. Yes, sir, but now unfortunately they are going down.

Q. She would have gradually increased in value in sound condition? [356] A. I think so.

Q. Now, when you went to place that insurance with the Firemen's Fund direct, were there any

(Testimony of George F. Thorndyke.)

other conditions attached to the change in character of the insurance other than the reduction in value and the increasing of the amount of insurance?

A. I do not remember anything else.

Q. Now, during the period you were insuring with the Firemen's Fund, you, in your own mind, were taking out the same character of insurance that you had in the preceding years during its placement by Johnson & Higgins?

Mr. BOGLE.—I object as incompetent, irrelevant and immaterial, the contract speaks for itself.

A. I supposed I was getting the benefit or I would not have changed from Johnson & Higgins and gone to Taylor of the Firemen's Fund.

Q. You understood that you were getting the same character of insurance, did you not?

Mr. BOGLE.—I renew my objection.

A. Yes, I thought we were getting total loss insurance.

Q. There was no discussion between you, that you can recollect of, of a change in the terms of insurance? A. No, I do not remember now.

Q. From the time— A. Except the valuation.

Q. Excepting the valuation, but that was the only change that was made in the character of insurance when you began to place it direct with the Firemen's Fund and continued to do so, and the insurance which had been procured for you by Johnson & Higgins? [357] A. I do not recollect anything.

Q. Now, during all that period you were insuring your vessels against total, constructive total loss

(Testimony of George F. Thorndyke.)

and general average and salvage charges, were you not?

Mr. BOGLE.—I object, the contract is in writing and speaks for itself.

A. My recollection is that the policies prior to the two sets of policies the Firemen's Fund gave us, did not have a typewritten clause in the margin covering the question of warranty.

Q. Contained here?

A. As I remember it. It may be that some policies had it but some may be did not have it.

Q. You cannot recollect?

A. I can recollect one policy of the Firemen's Fund there was a blank line stamped right on the margin.

Q. On the margin?

A. Yes, sir, prior to this time.

Q. That was during the days you were carrying insurance average?

A. I do not think so. I think after that we agreed on the five per cent average a long time ago when the vessels were first built.

Q. What was your reason for changing from Johnson & Higgins to the Firemen's Fund direct?

Mr. BOGLE.—I object as incompetent, irrelevant and immaterial.

A. Why, I cannot think of any special reason except that I thought it would be as well to do business through Taylor as through brokers.

Q. You went to Taylor and said you wanted the same character [358] of insurance except as to

(Testimony of George F. Thorndyke.)

the valuation and change in the amounts?

A. We had several interviews and Mr. Taylor fixed the values.

Q. Did the interviews pertain to the questions of value in dispute, as to the valuation of the vessel?

A. I do not know that Taylor and I ever had any dispute as to the matters we conversed about.

Q. The conversations were about what?

A. The topic of conversation was that he had the insurance to sell, and these valuations.

Q. Except for the change of valuations you were seeking the same character of insurance that you had had through Johnson & Higgins?

A. As I remember it.

(Witness excused.) [359]

[**Testimony of H. R. Clise, for Plaintiff (Recalled).**]

H. R. CLISE, recalled on behalf of the plaintiff, testified as follows:

Q. (Mr. BOGLE.) Are you familiar with the trip made by Thorndyke to San Francisco about February 17, 1912, referred to in the first item of exhibit "Q" in this case?

A. Yes, sir, I accompanied Mr. Thorndyke.

Q. What was the purpose of that trip?

A. Immediately after the salvage was settled in Portland, an intimation was made that if we went to San Francisco it might be possible to settle the difference between the Firemen's Fund and the Globe Navigation Company. And we went to San Francisco for that purpose.

Q. Where was the "Nottingham" lying at that

(Testimony of H. R. Clise.)

time? A. I suppose at St. Johns, Oregon.

Q. In whose possession was she?

A. In fact she was in nobody's possession except such acts as were done to preserve the hull as much as possible.

Q. The underwriters had refused to accept your abandonment? A. They had.

Q. And you had refused to recede from your abandonment? A. Yes, sir.

Q. Then up to the time you settled the salvage claim the vessel was in the charge of the United States Marshal under the libel in that case?

A. Yes, sir.

Q. And after that was settled the marshal withdrew and left the vessel in nobody's possession?

A. Yes, sir.

Q. And that was the status when you and Thorn-dyke went to San Francisco on this trip to try to get some adjustment [360] with the Firemen's Fund? A. It was.

Q. And that is the same trip referred to in the last item of exhibit "Q" where your expenses are included? A. Yes, sir.

Q. Do you remember the occasion of Mr. Thorn-dyke's trip to Portland, about May 14th, 1912?

A. My remembrance is that that was taken after the conference in my office, where Mr. Page and Mr. Campbell and Captain Gibbs and Mr. Walker went down there to see if some adjustment could not be made.

Q. Were Mr. Walker and Captain Gibbs on that

(Testimony of H. R. Clise.)

trip to make further inspection of the vessel with a view of reconciling those differences that had arisen between Walker and Captain Crow? A. Yes, sir.

Q. And Mr. Thorndyke went along as the representative of the owner of the vessel? A. Yes, sir.

Q. You know nothing personally of the items of expense? A. I know nothing about that.

Q. Mr. Campbell has asked Mr. Thorndyke about the purpose of bringing the vessel from Astoria to St. Johns. Was that done under your direction or was it through the negotiations which you conducted? A. Yes, sir, it was.

Q. What was the purpose of it?

A. The purpose of placing the vessel in a condition where she could be discharged and drydocked so that all parties could ascertain her condition. And also for the [361] purpose of preserving and making some disposition of her cargo and getting it out of the vessel.

Q. These services were necessary whether there was any liability under the insurance or not?

A. In my opinion, yes, sir.

Cross-examination.

Q. (Mr. CAMPBELL.) I do not understand about the statement of expenses to San Francisco. You say it was on the same trip that Mr. Thorndyke made? A. Yes, sir.

Q. His trip was February 17 to 26th, and yours is February 12?

A. Then it must have been wrong. We were right together. I know we were together down

(Testimony of H. R. Clise.)

there. I think there is some mistake in the date, because we were together.

Q. Anyway that was for the purpose of trying to reach an adjustment with the Firemen's Fund on the question of loss under the policy?

A. It certainly was.

Q. Now, in the last item, Mr. Clise, I see that you have \$248.90 and in that you charge \$150 attorneys fees.

A. I only know what that says. I presume it is correct.

Q. Well, you have been testifying here regarding the account. Don't you know what it is for?

A. Yes, I know part of it is for my expenses and part of it for my fees.

Q. What did you write \$150 in ink for?

A. I did not do it.

Q. Who did? A. I do not know. [362]

Q. It was written in since you came here?

Mr. THORNDYKE.—I wrote that in in the office. I wanted to know the segregation of that account and I got it. I did that in my own office. I thought you would call for a segregation and so I put it down.

Q. You were acting at that time as general counsel for the Globe Navigation Company and owners and also representing the mortgagees of the vessel?

A. Yes, sir.

Q. What does this item of ten dollars—should that not have gone in as part of the salvage claim?

A. I cannot explain that item.

(Testimony of H. R. Clise.)

Q. Marshal's fees \$2.12.

A. I noticed that was there. I cannot explain that. I never saw that until I came here.

Q. By telegrams, \$3.24.

A. I do not know anything at all about that. It has been so long since the bills were rendered.

Q. Clerks fees and marshals fees would only be payable to the officers of the court. A. Yes, sir.

Q. And the only time you were ever in court over this loss excepting in the present suit, was in the salvgae case in Portland? A. That is all.

Q. And the other expenses of the salvage and litigation were charged in the general average, were they not? A. I think so.

Q. You will admit for the purposes of this record that the clerk's fees \$10 and the marshal's fees \$2.12 should [363] be charged in general average with the other salvage suit expenses?

A. It should have been, yes.

Q. This give or take offer that we have been stipulating about was over and above the salvage expenses on the vessel, that is to say the give or take offer of five thousand dollars was give or take for the vessel free and clear of all salvage charges?

A. Yes, sir. That was made after the salvage charges had been made and had no reference whatsoever to the salvage charge one way or the other.

Q. And was after the vessel was free of all liens which resulted from the disaster. A. Yes, sir.

(Witness excused.)

It is stipulated that the date of February 12 in

(Testimony of H. R. Clise.)

the H. R. Clise item of expense at the bottom of exhibit "Q" is an error and should be February 17th.

It is stipulated that the expenditure for coal-oil amounting to \$4.05 is under date of February 5, 1912, and the coal-oil was used to maintain lights aboard the vessel as required by law, and for use by the watchman.

(Hearing adjourned.) [364]

Seattle, July 31, 1913.

Present: Mr. CLISE and Mr. BOGLE, for the Plaintiff.

Mr. CAMPBELL, for the Defendant.

DEFENDANT'S TESTIMONY.

[Testimony of S. B. Gibbs, for Defendant.]

S. B. GIBBS, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Q. (Mr. CAMPBELL.) What is your full name?

A. Stephen B. Gibbs.

Q. How old are you? A. Fifty four.

Q. Have you ever been a master mariner?

A. I have.

Q. For how many years? A. About eighteen.

Q. In what class of vessels? A. Sailing ships.

Q. How did their type compare with the type of the "Nottingham"?

A. They were a little different type. I think the last one was partly rigged like the "Nottingham."

Q. Were the vessels engaged in the same class of trade as the "Nottingham"?

A. Yes, occasionally.

Q. Wooden vessels? A. Wooden vessels.

(Testimony of S. B. Gibbs.)

Q. What is your present business?

A. Agent and surveyor for the San Francisco Board of Marine Underwriters.

Q. How long have you been such? [365]

A. About 11 years and 6 months.

Q. At what ports? A. Seattle.

Q. Over what territory does your jurisdiction extend?

A. Over the whole of Puget Sound and Alaska.

Q. What are your duties as such surveyor?

A. To survey damages to vessels, load and fit vessels.

Q. Did you ever have occasion to survey and repair damaged vessels? A. I have.

Q. How many damaged vessels do you suppose you have surveyed in the last eleven years?

A. That would be very hard to say. Probably four or five hundred.

Q. Did you at any time obtain from Hall Brothers an estimate of the cost of removing the wash strakes on both sides of the "Nottingham," from the break of the poop to the break of the forecastle-head, and caulk the back of the bulwark stanchions?

A. I did.

Q. Is that estimate of theirs in writing, to you?

A. Yes, sir.

Q. Have you it with you? A. I have it.

Q. What estimate did they give you?

A. \$275.50.

Mr. CLISE.—I object, it is not the best evidence.

Mr. CAMPBELL.—I offer the letter in evidence.

(Testimony of S. B. Gibbs.)

Paper marked Defendant's Exhibit "8," filed and returned herewith.

Q. Did you hear Mr. Walker's testimony this morning with [366] respect to the modification that should have been made in the work to be done under the Hall Brothers' bid for the cost of removing the wash strake, being item number 6 in exhibit "K"?

A. I do not remember just what he said about that. I would not want to say.

Q. Would the work which Hall Brothers have stated that they would do for \$275.50 in their letter marked exhibit "8" be, in your judgment, a compliance with their specifications in Walker's supplemental report exhibit "J," providing as follows: "Remove the lower bulwarks planks or wash strake on each side for their full length, caulk at back of same and renew planks." Modifying that as Walker did, that full length only meant from the break of the poop to the break of the forecastle-head?

A. The specifications as they read there call for the renewal of the strake there for the whole length of the ship. This only calls for a renewal from the break of the poop to the break of the forecastle. It is different entirely.

Q. Is the work which Hall Brothers agree to do on the estimate of \$275.50 the same work that would have been required to have complied with the specifications in Walker's supplemental survey, providing that the survey only called for the removal of the bulwarks planks or wash strake on each side of the

(Testimony of S. B. Gibbs.)

vessel from the break of the poop to the break of the forecastle-head, caulk it back of seams and renew planks? A. Just the same.

Q. The only difference is that the original specifications [367] drawn by Walker called for wash strake all around the vessel, and the bid of Hall Brothers to you was from the break of the poop to the break of the forecastle-head? A. Yes.

Q. I will ask you if that is your signature attached to exhibit "5a"? A. It is.

Q. Do you recollect going to Portland in May, 1912, and visiting the "Nottingham" as she lay at the St. Johns Drydock, in company with Captain Crow and Charles Page? A. I do.

Q. Will you state whether or not at that time any measurements were taken by you of the lineal feet contained in the deck seams recommended by the original specifications to be caulked?

A. There were.

Q. State whether or not the measurements that you took included 4 deck seams on each side of the waterways on both sides of the vessel, around the hatch coamings and one seam the full length of the vessel alongside of each side of the hatch coamings?

Mr. CLISE.—I object as leading and suggestive.

A. I took measurements of all seams on deck and around hatch coamings called for by the specifications.

Q. Which specifications?

A. Original specifications.

(Testimony of S. B. Gibbs.)

Q. Did you make a record at that time of the figures?

A. I gave the figures to Mr. Page and he made a note of them. I did not keep that myself.

Q. Was Page present when you made the actual measurement of [368] the deck seams?

A. He was.

Q. State whether or not you saw Page make a record of them? A. I did.

Q. Have you any present knowledge of what the total lineal feet amounted to?

A. Only from memory. About 17,000 on the main deck.

Q. Is Captain Crow dead? A. He is.

Q. When did he die?

A. About three months ago.

Q. Did you at that time make any estimate of the lineal length of the seams on the outside of the vessel?

A. I did.

Q. Did you make any record of these figures at that time?

A. I gave the figures to Mr. Page and he made a record of them.

Q. State whether or not Page was present at the time the measurements were actually made by you?

A. He was.

Q. Did you at that time, or at any other time, examine the seams around the stern post of the "Nottingham"? A. I did.

Q. In what condition did you find the seams to be?

A. I found the oakum entirely out between all the

(Testimony of S. B. Gibbs.)

hood-ends under the stern post, about the 20 foot draft.

Mr. CLISE.—I suppose all this testimony applies to the one time that he made this examination?

Mr. CAMPBELL.—Yes, sir.

Q. This was about the first of May? [369]

A. It was the second day of May we went over there.

Q. What was the condition of the seam between the ends of the plank and the stern frame of the vessel where the planking rebated on to the stern frame?

A. That is what I was speaking of. That is where we found the oakum out, at the hood-ends where the plank butts on to the stern post.

Q. On which side was that?

A. On the port side.

Q. At what draft of the vessel?

A. About 20 foot draft.

Q. Was there any notation made by you at that time of the draft at which this oakum seam was found? A. Yes, sir, we measured it.

Q. Did you make a record of it?

A. No, I did not, Mr. Page took a record of it.

Q. Was he present at that time? A. He was.

Q. Did you at that time do anything by which you could ascertain the condition of that seam?

A. I put a rule in the seam to see whether there was anything in it or not.

Q. What did you find?

A. I found nothing in it.

(At this time a recess was taken until 1:30 P. M.)

July 31, 1913—AFTERNOON SESSION.

Present: Mr. CLISE and Mr. BOGLE, for the Plaintiff.

Mr. CAMPBELL, for the Defendant.

S. B. GIBBS, on the stand for further direct examination.

Q. (Mr. CAMPBELL.) Do you recollect how far into the seam you could insert the rule?

A. About six inches.

Q. Can you show me on exhibit 3 about where that seam was? You have testified the seam was on the port side, and this exhibit shows the starboard side of the vessel.

A. It is at the 20-foot mark. It would be about 4 inches above the 20-foot mark.

Q. Mark with a cross the corresponding position on the starboard side.

(Witness does so.)

Q. Now, the seam about which you have been testifying was on the port side? A. On the port side.

Q. About the position marked with the X on the starboard side of exhibit 3? A. Yes, sir.

Q. Now, I will hand you another photograph and ask you whether or not that is a photograph which shows the seam in question? A. It does.

Mr. BOGLE.—When was that photograph taken?

Mr. CAMPBELL.—That was taken by Captain Gibbs on his visit May 6th. They were all taken at the same time. [371]

Q. What is there inserted in the seam in the photograph? A. A two-foot rule.

(Testimony of S. B. Gibbs.)

Q. How did the insertion of the rule made by you correspond with that shown by that on the photograph? A. Just about the same.

Q. Did you examine the water-closet flange on the port side of the vessel? A. I did.

Mr. CAMPBELL.—I offer the photograph identified by the witness in evidence.

Photograph marked Defendant's Exhibit "9," filed and returned herewith.

Mr. BOGLE.—Is this with a view of establishing a claim that she was unseaworthy? Are you making such a claim as that?

Mr. CAMPBELL.—I do not know whether we will make that claim or not. It depends on how the testimony develops.

Mr. BOGLE.—I object as incompetent, irrelevant and immaterial; not pertinent to any issue made in the pleadings in this case. If there is to be a defense of unseaworthiness I want it set up in your pleadings so that we can address testimony to it.

Mr. CAMPBELL.—I might say, to be perfectly frank with you, that the evidence which has very recently come in our hands makes it very likely that we will take that position.

Mr. BOGLE.—Then we ought to make the pleadings up before the taking of testimony. We do not want testimony taken on other issues and then have it sprung on us later.

Mr. CAMPBELL.—I do not intend to spring it on you. I am not in a position to allege unseaworthiness at the present [372] time. I am not advised

(Testimony of S. B. Gibbs.)

myself at the present time of facts to support the charge of unseaworthiness, but I believe it will be adduced from the master of the vessel, from the statements which have been made here during the examination which point to that fact.

Mr. BOGLE.—Then I renew my objection at this time: That it is not addressed to any issue made in the pleadings in this case, and if it is intended to be addressed to some issue to be made in the future, I object to it as premature, and taken at a time when we are not able to determine its competency or relevancy to that issue.

Mr. CAMPBELL.—I will give notice now that if the testimony produced in the case develops an unseaworthiness of the vessel on sailing, that I shall ask leave of the Court to amend my pleadings to conform to the proof. This testimony that I am seeking now not only goes to that proposition, so far as it may bear upon it, but also to the further contentions being made in this case as to the necessity of certain caulking recommended by Mr. Walker three months after his original specifications were drawn.

Q. I hand you another photograph and ask you whether or not that shows the location of the water-closet flange on the port side? A. It does.

Q. Mark on it the water-closet flange.

(Witness does so.)

A. The crack shows.

Q. Mark the water-closet flange with a W.

A. I have. [373]

Mr. CAMPBELL.—I offer this proof in response

(Testimony of S. B. Gibbs.)

to the statement in Mr. Walker's supplemental survey report which refers to concealed leakage: "The vessel contains a concealed damage in the shape of serious leakage, which so far has not been accounted for, and judging from the master's sworn statement only makes itself apparent under certain conditions." We will later account for the reasons of the conditions and the appearance of the leakage coming through the seams in question shown by the photographs. I offer this photograph in evidence and ask the commissioner to paste over the back of this photograph a heavy sheet of paper which will obliterate the notations made there, unless counsel is willing it shall go in in its present form.

Photograph marked Defendant's Exhibit "10," filed and returned herewith.

Q. What was the condition of the water-closet flange, Captain Gibbs?

A. Crack in the lead flange.

Q. What is the flange?

A. The soil-pipe leading from the side of the ship, the outside edge is the flange over the inlet to the planking.

Q. In your judgment would that crack admit water into the vessel? A. It certainly would.

Q. Where was that with respect to the load line of the vessel? A. Below the load line.

Q. Captain, assuming that the schooner "William Nottingham," when she left the bar of the Columbia river and got on to [374] the Pacific ocean, stood offshore on a port tack, and she was at that time

(Testimony of S. B. Gibbs.)

drawing 21' 4", and that the crack along the stern frame, the seam along the stern post, was at the 21-foot mark, and the vessel encountered any breeze sufficient to give her headway, I will ask you whether or not in your judgment the vessel would list to starboard sufficiently to lift the seam along the stern frame out of the water, so as to lessen the leak through that seam?

A. Yes, she would if she had any breeze at all.

Q. What do you mean by saying that the vessel is on the port tack?

A. When the wind is on the port side they say the wind is on the port tack.

Q. With the schooner "Nottingham" on the port tack, which way would the wind be coming across her, from port to starboard or starboard to port?

A. The wind would be coming over the port side.

Q. What effect would that have on the vessel maintaining an even keel?

A. Depends on the strength of the wind. The further ahead the wind was the more she would lie over, of course the stronger the wind.

Q. If, at the time, the "Nottingham" was proceeding on the port tack under a good sailing breeze, would she, in your judgment, have been listed over to the starboard sufficiently to have lifted the seam out of the water? A. I think she would.

Q. Under these circumstances would any water get through the seam into the vessel, in your judgment?

A. Yes, there would be some water coming in when

(Testimony of S. B. Gibbs.)

on the port [375] tack, the sea would send some water in.

Q. If, after proceeding upon that tack the vessel was put upon the starboard tack, under a good sailing breeze, what effect would it have upon the seam in question as to its being lifted out of the water or forced under water? A. Forced under water.

Q. If this seam in question was open at the time she was proceeding upon that port tack, and she was put upon the starboard tack, what, in your judgment would be the effect upon the comparative leakage of water into the vessel through the seam?

A. It would be increased considerably.

Q. When?

A. When she was put on the starboard tack.

Q. If the "Nottingham" first proceeded upon the port tack and then upon the starboard tack, with the seam in question open, how would that affect the amount of leakage into the vessel, compared, in your judgment, with the following statement: "Shortly after leaving Astoria with the schooner 'William Nottingham,' I found that she began to leak more than usual, and had to pump one hour out of four. Wind blowing from the south and the vessel on the port tack. I stood off to about longitude 128 west, when the wind hauled somewhat to the west of south, and I put the vessel on the starboard tack. When this was done I found the leak increased to such an extent that the hand pump was not able to keep her free. I started the steam-pump, which failed to work."

(Testimony of S. B. Gibbs.)

A. Well, that would prove that that leak was on the starboard side. [376]

Q. Where does a vessel first show evidence of strain?

A. I look for strains at the throats of her knees, at the ends of her knees, between decks and the stanchions, or rather in the hold.

Q. What do you mean by knees?

A. The knees are natural crooked roots of trees, put in at the end of the beams and fastened there to the frames. One end fastened through the deck beams and the other portion fastened through the ceiling and through the frames.

Q. It is a bracket-like piece of wood which holds the beams in place to the frames of the vessel?

A. Yes, sir.

Q. Where else would you look for the first evidence of strain?

A. I would look along the waterways, hatches, mast partners.

Q. Did you examine this vessel to see whether she showed any evidence of strain around the knees or other places? A. I did.

Q. What did you find?

A. I did not find any evidence of strain.

Q. Was there any evidence of strain about that vessel that you found, which would indicate that she had strained sufficiently to loosen the oakum in her outside seams between the planking or caulking cement? A. No, I did not.

Q. When did you first see the vessel?

(Testimony of S. B. Gibbs.)

A. Second day of May, 1912.

Q. Captain, what effect upon the outside planking of the vessel would exposure to the weather without care have? A. Shrink up. [377]

Q. What appearance would that give to the cement in the seams? A. Show a crack in the cement.

Q. Whereabouts in the cement?

A. On the sides of the cement, fore and aft.

Q. Between the cement and the plank?

A. Between the cement and the plank.

Q. State whether or not you noticed any such condition existing at the time you saw the sides of the vessel in May. A. I did.

Q. Captain, what would be meant by this provision in the original specifications: "Before ship is again placed in water, entire planking of hull to be searched for leaks with hose on inside"?

A. It would mean that they would put the nozzle where the air strakes were on both sides of the ship for the purpose of discovering the leak, by the water coming through the outside plank.

Q. What do you mean by air strakes?

A. Air strakes are places located in the ship's ceiling to ventilate the plank.

Q. What is the ceiling of the vessel?

A. The ceiling is the planks that are put in, timbers on the inside bolted over the frame, to give the ship her strength. That is where she gets her strength, from the ceiling.

Q. What can you say as to whether or not whether the watering of a vessel in the manner prescribed by

(Testimony of S. B. Gibbs.)

the specifications is or is not a customary manner of testing a vessel for leaks?

A. It is customary. [378]

Q. In your judgment would any competent ship repairer understand the meaning of such a provision in the specifications?

A. I should think he would.

Q. I would ask you whether or not, Captain, there was any special danger incident to the towage of this vessel from Astoria to Portland, other than there is to any other towage of a vessel on the Columbia river?

A. None whatever, provided the water is out of the ship.

Q. How do they tow vessels on the river, ahead or astern?

A. Alongside. I have always towed alongside when I was going up the river. Never saw them towed any other way.

Q. Why did they do that?

A. Because it is safer, and you can steer the ship better alongside and look after her better in making turns around the river. You can tow a ship better alongside than you can with a hawser ahead.

Q. Have you ever been up and down the Columbia river? A. I have.

Q. As shipmaster? A. Yes, sir.

Q. What can you say as to the character of the channel and the danger of vessels stranding on that river?

A. It is all right as long as you keep in the channel,

(Testimony of S. B. Gibbs.)

light draft; if you get out of the channel there is danger.

Q. How large vessels ply up and down the Columbia river? A. Vessels of five thousand tons.

Q. How do they compare in size with the "Nottingham"? A. Very much larger.

Q. When you visited the "Nottingham" in May, was there any watchman on board of her? [379]

A. No. There was a man on the dock who evidently had charge of the dock, watchman on the dock. He stated he was also looking after the "Nottingham," but he was not on board.

Q. Was there or was there not, in your judgment, any evidence of the vessel having been wet down and cared for? A. I did not see any.

Q. What do you mean by that, did not see what?

A. I did not see any evidence of that having been done.

Q. What condition did you observe the deck to be in in May?

A. The seams were more or less cracked, the putty in the seams.

Q. What effect would the exposure of the decks to the air have upon the putty in the seams?

A. Tend to crack them.

Q. How did the condition of the seams as you saw them compare with the condition that you would expect the seams to be which had been exposed to the weather?

A. They looked as though they were shrunk up.

(Testimony of S. B. Gibbs.)

Cross-examination.

Q. (Mr. BOGLE.) Captain, what was the occasion of your asking Hall Brothers for a bid upon a particular item of the repair referred to in Walker's supplementary report that you have spoken of?

A. I think, as I recollect it now, the occasion came up of Walker discussing that with me, and the price of it, and I think he had shown me a supplementary report, so that I wrote over to Hubbard and asked him to send a tender. We did not agree on the price.

Q. You had seen their previous bid, had you?

A. No, I had not seen it. [380]

Q. You knew what it was?

A. No, I think their bid came in after mine, I am not sure on that point.

Q. Let me call your attention to the bid. I imagine that you had discussed with Walker the bid on that particular item, number 6, and had agreed that there was some mistake about it, it was too high, and that was the occasion for your asking for this second bid on that particular item?

A. I do not think I saw this at all, but I am not quite sure just what the circumstances were that led me to call for this tender. But as I say, my impression now is that there was an argument between Walker and myself as to the cost of renewing these wash strakes. I had not seen that one.

Q. You knew they had made a bid on Walker's supplementary recommendation, didn't you?

A. I do not think I did at that time.

(Testimony of S. B. Gibbs.)

Q. How did it happen then that your request for a bid on that particular item went to the same concern that had bid on these specifications of Walker, as shown by their letter of March 11th?

A. How is that?

Q. Their bid shown by exhibit "K" for doing the work called for in Walker's supplemental report of March 11th, and it seems from the evidence that that is the only bid that has been made on that work. I ask you why it is that you did not know that they had bid on that work, you happened to call upon them for an estimate or a bid upon this particular item? No. 6 of their previous bid? [381]

A. Well, I am not prepared to say whether I knew the amount of their bid or not. I am not positive on that point. The best of my recollection is that I did not know what their bid was. I think it came about through an argument with Walker as to the cost, but I am not positive.

Q. In the letter from Hall Brothers to you, it states, "In line with your request of the writer personally for our price for the above work," etc. That would indicate that you had had a personal interview with Hubbard, the manager of Hall Brothers?

A. Yes, sir, I did.

Q. How was it that you asked bids for this particular part of the work referred to in Walker's supplementary report of survey?

A. As I say, it might have been through discussing the thing with Walker. I am not quite sure. But I do not think I saw his tender.

(Testimony of S. B. Gibbs.)

Q. You had seen Walker's supplementary report of survey? A. Yes, sir, I have seen it.

Q. You had at that time?

A. Yes, sir, I think I had.

Q. And you knew that he either had or would ask for bids on it, didn't you?

A. Well, I had no way of ascertaining whether he was going to ask for bids for that work in the supplemental report. Naturally supposed he would.

Q. Captain, it seems from Walker's testimony that he stated or conceded the bid for this particular item was too much, and assumed that it originated in some misunderstanding of the specifications. Now, did not Mr Walker in his [382] conversation with you, state that he thought the bid on that particular item was too high?

A. No, I do not recollect his having made that statement.

Q. When you went to Portland to examine this vessel in May, did Mr. Walker go along?

A. He came the next night.

Q. Was there not an arrangement between the parties, both sides, that you and Mr. Walker should make an examination of the vessel with a view of passing upon the particular items where Walker and Crow disagreed?

A. There was an agreement made, I believe, that we should get together and discuss these different items and see if we could come to an agreement.

Q. You knew at that time that there were differences between Walker and Crow in regard to the

(Testimony of S. B. Gibbs.)

work that was required to be done on the vessel?

A. I did.

Q. And you knew that a considerable portion of these items as to which there was a disagreement between them was included in Walker's supplemental report of survey?

A. The items which Walker and Crow disagreed upon, were in the original specifications. I do not know that Crow saw the supplemental report.

Q. Whether Crow did or did not, did you not understand when you went to Portland and had this inspection of the vessel with Mr. Walker, that you were to advise the Firemen's Fund with respect to these recommendations contained in his supplemental report?

A. My letter from the Firemen's Fund, my instructions from the Firemen's Fund, are set forth in their letter to me. [383] I have the letter right here. They are all embodied in the original specifications with the exception of that of the caulking of the hull and the renewal of the shoe, that is not mentioned in this letter.

Q. Were you advised of any differences or objection on the part of the Firemen's Fund, to the item or repair called for by Walker's supplemental report of survey?

A. I do not recollect being advised by the Firemen's Fund at that time, but I went over this agreement with Walker.

Q. You went over this agreement with Walker. You went over this supplemental report of Walker's

(Testimony of S. B. Gibbs.)

prior to the time you went to Portland in May, didn't you? A. Yes.

Q. You knew what it was? A. Yes.

Q. Now, don't you know that Mr. Page, representing the Firemen's Fund, was there disputing, or not willing, to concede the necessity of repairs called for in that report? A. Yes.

Q. And he wanted your opinion on it?

A. Yes, sir.

Q. There is no question about the representatives of the Firemen's Fund at that time being familiar with this supplemental report of Walker, was there?

A. I believe not.

Q. Did you ever examine the vessel more than this one time in May?

A. The second and third, two days.

Q. That was a continuous examination, was it, from one day to the other? [384] A. Yes.

Q. You say that you found a seam on the port side of the vessel from which the concrete and corking had fallen out or been drawn out? A. I did.

Q. You, of course, do not know when it came out?

A. No.

Q. On what line of the vessel was that seam?

A. What draft?

Q. Yes.

A. I think it was the 21 foot and four inch.

Q. You do not know what the vessel's draft was loaded? A. 21' 6", I believe.

Q. Did you see her loaded? A. No.

Q. How do you know what her draft was, captain,

(Testimony of S. B. Gibbs.)

if you never saw her loaded?

A. I have inquired what the draft was loaded. I have records up in the office showing the draft she loads at. I have heard Mr. Thorndyke state what the draft was at that time when she loaded.

Q. Who was in charge of the vessel at the time you were there?

A. The man on the dock said he was looking after her, under the employment of the dock company.

Q. What I mean is, was she still in charge of the United States Marshal under the libels? A. No.

Q. She had been released from that?

A. I think she had been released from that. I am not [385] positive of that. I did not see any evidence of it.

Q. She was not in possession of either the Firemen's Fund or The Globe Navigation Company, was she?

A. That I am not in a position to know just what her status was.

Q. Do you not know from the conference that was had at that time that each was disclaiming any interest, that each claimed the other was or should take possession and look after the vessel?

A. Yes, I knew there was some controversy over it. I knew that the Underwriters were taking no action looking after the vessel.

Q. Neither were the owners, so far as you saw?

A. I do not know, only from the fact that the watchman was there; I imagined that he was put there by the owners to look after her. I had no way

(Testimony of S. B. Gibbs.)

to determine that.

Q. You had no way of determining that. A. No.

Q. Now, Captain, how long had the vessel been on the dock at that time?

A. She was not on the dock.

Q. Where was she?

A. She was lying at the St. Johns' drydock.

Q. How long had she been lying there?

A. Well, it was May when I looked at her. I do not know how long she had been lying there.

Q. Had she been there six months?

A. Probably.

Q. Do you know, Captain, whether the concrete caulking had come out of this seam prior to the time she started on *her* [386] *the* previous fall?

A. No, I do not.

Q. What would be your judgment, Captain, as a shipmaster, from your investigation there, as to whether that seam was open prior to the commencement of her voyage?

A. You mean the seam in the stern or the seams on the top side?

Q. The seam on the side where the concrete had opened out around the valve?

A. My impression would be that it was out before she started on the voyage, from the looks of the cement.

Q. What do you base that on, Captain?

A. Because of the condition of the corking, there was no oakum in the cement.

(Testimony of S. B. Gibbs.)

Q. Did it not have the appearance of being picked out?

A. There were two pieces hanging out above this corking.

Q. That evidently either came out since she had been put there at the dock?

A. There is no way of telling that either. There is no way of determining that.

Q. It would not have been hanging there if it had had been hanging there when she started on the voyage and gone through the storm?

A. Might possibly have been. It was only a small thread there and might escape observation.

Q. If she got into a storm as the captain in his protest reports that she did, and became waterlogged, and was broke up in the manner she was, would it not have washed off any piece that had been hanging on the side? A. Not necessarily. [387]

Q. Is it not probable that it would?

A. No. I hardly think it would. Oakum sticks into the seam and even if washed out there is always a thread hanging that does not wash out, simply hangs there.

Q. Captain, did not this seam have the oakum and cement picked out of it?

A. I could not say. There was nothing in the seam. I was very particular not to touch the oakum when I examined it. I would not say that it had that appearance. There is no way of determining it.

Q. There was nothing in the appearance of it that would make that a very probable way of its coming

(Testimony of S. B. Gibbs.)

out? A. It could have been taken out, of course.

Q. Now, what was the width of the seam of oakum?

A. Well, I should say it was at least three sixteenths of an inch.

Q. What length?

A. It was open, when I looked at it, about a foot, as near as I can recollect.

Q. Above the water-line?

A. Yes. A little below deep water-line.

Q. Above the water-line as she lay? A. Yes.

Q. Perfectly dry? A. Yes, sir.

Q. And that part of the vessel had been dry at least from the time that the cargo was removed from her? A. Yes, sir.

Q. Was that open seam in such a position that surveyors in making a survey of the vessel with any degree of care, [388] would have overlooked it?

A. They might.

Q. Well, would that appear reasonable?

A. Yes, it is a very hard place to get in. A man making a survey does not usually go around under the quarter to look at the seams. It is a hard place to get at. It would be very easy to overlook a place of that kind.

Q. If a vessel had been damaged as this one had been, the extent of which was unknown, and there was a controversy between the owners and underwriters as to whether the injury was of such an extent as would amount to a constructive total loss of the vessel, and experienced and competent surveyors

(Testimony of S. B. Gibbs.)

were appointed by both sides to make a thorough inspection of that vessel, and report the full extent of her damage, could they have overlooked this open seam without being guilty of the grossest carelessness? A. After the vessel returned?

Q. Yes, after she was placed in the drydock and cargo discharged.

A. You would not be able to discover that seam in a drydock because it would be so high up in the dock. The only way of getting up to it would be to rig a whole lot of staging, and it might have been overlooked, very easily overlooked in the drydock, the fact of its being located where it was difficult to get at.

Q. You discovered it immediately upon beginning your inspection?

A. I was notified that seam was open and I knew just where to look for it. [389]

Q. By whom were you notified?

A. Captain Crow.

Q. When did he discover it?

A. I do not know. He did not tell me. That is where we always look on a vessel's top sides around under the counter, that is where to look nineteen times out of twenty, that is where I look for it.

Q. Now, in this instance, Captain, after the claim made by the captain that the vessel was leaking, and the surveyors making an effort to find where that leak was, if this seam had been open at that time would you not think that they would find it if they made a proper inspection and search for the leak?

(Testimony of S. B. Gibbs.)

A. If they had made a thorough search and inspection for the leak they should have found it.

Q. If they were competent marine surveyors they would have looked just at this place to have found one?

A. If they were looking for the leak in the ship they should have found it. But it may be that it escaped their attention.

Q. You know Frank Walker? A. I do.

Q. How much experience has he had as marine surveyor?

A. Well, he has had a good many years.

Q. Some ten or twelve years or more? A. Yes.

Q. During that time he has been quite as active as you have as a surveyor? A. Yes, sir.

Q. You regard him as a careful and competent surveyor? [390]

Mr. CAMPBELL.—Mr. Walker is not on trial as to competency. The examination is unfair for that reason, for counsel is advised of the fact that Captain Crow is dead who made this survey with Mr. Walker. I have no objection to your proceeding on that line, providing that you will admit in evidence a survey report which we hold, by Captain Crow, made under date of October 17th, in which he specifically points out this defective seam.

Mr. BOGGLE.—You are referring to something that I do not know anything about. We will not make any condition as to asking questions which we think are competent.

(Testimony of S. B. Gibbs.)

Mr. CAMPBELL.—You can ascertain by examining the report.

Mr. BOGLE.—When that is offered we will consider whether we will object to it, but not now.

Q. What I want to know now, Captain Gibbs, is your judgment as to whether Mr. Walker is a competent, careful surveyor, experienced, competent and careful?

Mr. CAMPBELL.—I object as improper.

A. Yes, sir; he is a competent surveyor.

Q. You have read the report of survey made by Mr. Walker and Captain Crow, jointly, have you not, Captain? A. Yes, sir.

Q. That report shows that they were looking for the leak, don't it?

A. I do not remember anything at present in the survey.

Q. Do you know, Captain, whether this seam was really open so that it leaked or not?

A. As I saw it?

Q. Yes, sir.

A. No question about it leaking in the condition in which I [391] I saw it.

Q. How much water would get in through it?

A. It would keep a pump going most of the time.

Q. The pumps would take care of it?

A. Yes, if they were kept going constantly. I have been in a ship at sea with no bigger leak than that, that kept us pretty busy pumping, in about the same location, the same kind of a leak.

Q. Was this forward or aft? A. Aft.

(Testimony of S. B. Gibbs.)

Q. Do you know how she was trimmed?

A. When she sailed?

Q. Yes, sir. A. Not exactly; no, sir.

Q. This vessel, the "Nottingham"?

A. The "Nottingham," I imagine—

Q. Not what you imagine—you don't know?

A. I do not know, without looking it up.

Q. You do not know what the draft was?

A. I got her draft from Thorndyke at the time he left Portland.

Q. Do you know what it was?

A. I think it was 20 feet, six inches, to the best of my recollection, now.

Q. And this seam was 21 feet, four inches?

A. It is 20 feet, four inches. I made a mistake in that a moment ago.

Q. What makes you say, now, Captain, that this seam was at the 20 foot 4 inches mark instead of 21 feet four inches?

A. Because at the time I figured that she was several inches under water, with her load draft she was several inches [392] under water, that seam.

Q. Can you tell from these photographs?

A. I think I can pretty near. Yes, here is the 20-foot draft right here.

Q. Now, where is the seam?

A. The seam is right here. This is 20-foot six, and this seam was below that six.

Q. Then you assume that this seam was about two inches under water when she was on a level keel, fully loaded? A. Yes, sir.

(Testimony of S. B. Gibbs.)

Q. You think that when that seam was under water it was in that condition, the same condition at the time of this storm, as when you saw it, it would take in enough water to keep one of the pumps going?

A. I think it would. The oakum was not only gone from that seam, but the seam above it.

Q. There was no danger of the vessel foundering or becoming water-logged with that stream and the pumps working, was there?

A. You cannot tell. It is hard to gage how much water would come in through that and the flange of the toilet-pipe. I know where the flange of a toilet-pipe leaked so that they had to throw the deck-load overboard because we could not keep her free. That has been done in many cases from the leak of the flange of the toilet.

Q. Would this concrete and oakum be worked out of that seam by the straining of the vessel, if she had been straining? A. Not in that locality.

Q. If it was not picked out, Captain, then what would [393] cause it to come out?

A. It might have been slack and washed out.

Q. Washed out while she was at sea?

A. Might have possibly dropped out before she started on the voyage.

Q. But it might have dropped out after she got back to St. Johns and dried out?

A. Well, I would not say when it came out, it is hard work.

Q. Why not just as likely to drop out after she

(Testimony of S. B. Gibbs.)

got back from the voyage as before she started on the voyage?

A. I did not say when it came out.

Q. You understand that this vessel stranded when she started on the voyage, before she got out of the river? A. Yes, I heard that she did.

Q. That would necessarily strain the vessel very considerably loaded as she was?

A. Not with lumber on sand bottom. I have been ashore a number of times with a whole deck-load of lumber, on a level bottom and never strained the vessel.

Q. Have you not been ashore at other times when it did strain the vessel?

A. I would not say they would not strain where the bottom was uneven, but where the bottom is soft.

Q. Do you know what it was in this instance?

A. Only what was reported to me by others that it was soft bottom.

Mr. CAMPBELL.—Has it not been agreed between the surveyors that no damage resulted from this stranding?

Mr. BOGLE.—I do not know except what has been shown in the evidence. [394]

Q. If this vessel with a full cargo of lumber including a full deck-load, went on a bar so that a part of the bottom of the vessel was resting on that and part was not, it would necessarily be a very considerable strain, would it not?

A. Yes, if she struck a bar.

Q. And is it not a fact that in pulling her off, even

(Testimony of S. B. Gibbs.)

if she had gone into the soft bottom, she would be strained?

A. No, that would not necessarily follow.

Q. Would it not likely follow, Captain?

A. No, I don't think it would in soft bottom. You could not get power enough on the vessel to do her much harm with an ordinary tow-boat in pulling?

Q. When you mention soft bottom, do you mean that the vessel is on soft bottom from stem to stern, practically equally?

A. I mean soft bottom, not a rocky bottom.

Q. Unless the bottom was even so that the vessel rested equally from stem to stern on the bottom, she would be strained, would she not?

A. Not necessarily. There might be a space, there might be a place where she did not touch at all and it would not strain her with a cargo of lumber; if she touched in half a dozen places it would not necessarily strain her with a cargo of lumber.

Q. You very frequently use the word "necessarily," Captain. I am getting at the probabilities of it, I do not mean it always does it with every vessel on every question of stranding. [395]

A. If a vessel was long and a good portion of the bottom that would not rest on the bottom, why it would be apt to strain.

Q. You speak of some crack in the flange-plate in the water-closet. Where was that located with respect to the draft of the vessel?

A. That was below the other, the 20-foot draft. I do not remember just exactly, but it was below that draft.

(Testimony of S. B. Gibbs.)

Q. What was the extent of the crack, Captain?

A. To the best of my recollection, now, it extended right around the hole. I will not be positive of the extent.

Q. Describe the flange, something about it, so that we may understand it.

A. I described it there as a pipe from the toilet, which leads through the side of the ship. The edge of the pipe is turned over and fitted on to the outside planking.

Q. What size was that pipe?

A. I should say it was about four inches.

Q. And what was the size of this crack in it, what was the thickness of the crack, the width of the opening in the crack?

A. Might have been a sixteenth of an inch.

Q. How long was it?

A. I think it extended right around the flange. I am not quite sure on that point now. The photograph shows the extent of it in some way.

Q. If it extended all the way around, why would not the pipe drop off?

A. No, I do not think it would; it was held on the inside. [396]

Q. If broken all the way around outside it would have fallen off?

A. No, the flange is turned over, and the inside of the pipe is fastened so that it would not drop out.

Q. Where would the water that entered that crack in the flange first go?

A. It would go down into the bilges, going through

(Testimony of S. B. Gibbs.)

the plank between the seams of the plank, down into the hold.

Q. How much water would enter in that, Captain, assuming that it was under water all the time?

A. It would let in a little stream in under that pressure, I would not want to state just how much.

Q. Would it fill the ship in the course of a couple or three days?

A. No, I do not think quite as bad as that. It would materially affect the pumping of the vessel. It would increase the pumping of the vessel a few hours probably in the twenty-four.

Q. These sailing vessels always take more or less water through the bilges, don't they?

A. No, not all of them. Some of them are practically tight.

Q. Most of them do, don't they? A. Yes.

Q. Now, this would have been a very small stream through that crack in the flange, would it not?

A. A small stream under pressure lets a lot of water in a ship.

Q. Now, I think you are a little inclined to argue these [397] things. In the first place, there don't seem to have been any more pressure—how deep was this under the water-line?

A. Well, I should say perhaps a foot and a half.

Q. You think it was down to about the 18-foot or 18-foot and a half draft line?

A. I think somewhere about the 18 or 19 foot draft.

Q. Which side was it on? A. Port side.

(Testimony of S. B. Gibbs.)

Q. Then it would not take any water except when the vessel was on the starboard tack or on an even keel, would it?

A. Well, providing the vessel was leaning over on the port tack, it would be out of the water, except the slopping of the sea, which would let in some water.

Q. It would be immaterial?

A. It would not be as much as if under water.

Q. Do I understand you to mean, Captain, that this crack in the flange would admit enough water to have any material effect in water-logging a vessel of this size in the course of a couple of days?

A. I think it would help in addition to the crack in some other place, the two combined.

Q. You think the two combined, with the pumps working, would water-log that vessel in two days?

Mr. CAMPBELL.—I object to the assumption as not being a fact that it would water-log it in two days.

Mr. BOGLE.—I want to get some notion of what the witness' judgment is as to the amount of water she would get in.

Q. I will ask you how long it would take to water-log that [398] vessel from these two leaks you have spoken of with the pumps working?

A. There is no way of telling how long it would take.

Q. It would not do it at all, Captain, would it, with the pumps running, these two leaks you mention?

A. Well, I don't know whether the pumps were running all the time.

Q. Now, Captain, don't argue with me again. Just

(Testimony of S. B. Gibbs.)

answer the question.

A. I would not say whether it would or not. It is impossible for anyone to tell how much water would come through any place of that kind.

Q. Do you know how this flange was broken?

A. No, I do not.

Q. Likely it had been broken by some logs or some heavy matter on the side of the ship running against it?

A. We see them broken very often on ships.

Q. If the deck-load washed over it would be very reasonable to assume that that would break it?

A. No, I do not think it would.

Q. Why not, Captain?

A. Well, it would show a dint in the flange if a piece of timber struck it. We have seen it in many cases extending right around. They do not seem to show any knock or any indication of anything to injure it. I do not know whether it is corrosion or not.

Q. What is the material of that pipe?

A. Lead

Q. Made of lead? A. Yes. [399]

Q. It would not have broken out, Captain, if a log or some other substance had not struck against it or the straining of the vessel?

A. Well, I would not want to say what breaks them, but I do know they do break frequently.

Q. There is nothing to indicate to you that it had been broken before she started on that voyage, is there? A. No.

(Testimony of S. B. Gibbs.)

Q. Could you tell whether it was an old break or a fresh one? A. No way of telling at that time.

Redirect Examination.

Q. (Mr. CAMPBELL.) I will ask you whether or not in your judgment, Captain, the seam and the crack of that flange were sufficient to account for the behavior or leakage of that vessel, described as follows: "Shortly after leaving Astoria with the schooner "William Nottingham," I found that she began to leak more than usual, and had to pump one hour out of every four, wind blowing from the south and the vessel on the port tack; I stood off to about longitude 128 west, when the wind hauled somewhat to the west of south, and I put the vessel on the star-board tack. When this was done, I found the leak increased to such an extent that the hand-pump was not able to keep her free; I started the steam-pump, which failed to work." A. I think it would.

Q. Now, you speak of competent surveyors. Captain, in your judgment, would it be possible for a competent surveyor— [400] would a competent surveyor make up specifications for repair of a vessel in which the specifications states it is their intent to make the vessel, place the vessel in the same good condition as before the accident, and provide in these specifications for the caulking of four seams alongside the waterways the full length of the vessel, one seam on each side of the hatch coaming full length of the vessel and around hatch coaming, and not provide for the caulking of the entire deck of the vessel, if she needed it? Do you think any surveyor would

(Testimony of S. B. Gibbs.)

make specifications of that character?

A. Well—

Q. Make up specifications of that character, when it was the intention to place that vessel in a seaworthy condition, if the rest of the deck needed caulking?

Mr. CLISE.—I object to the question on the ground that there is nothing to base that supposition upon; that it is not based upon anything contained in the survey and specifications as agreed upon by Walker and Captain Crow.

Mr. CAMPBELL.—I object to the statement of counsel. There was an express agreement on that point.

A. I think the surveyor who made up specifications of that kind intended to cover everything there was to be done to that ship to put her back in the same condition as she was before the accident, that was his intention.

Q. Now, would a surveyor recommend a specific piece of caulking in his specifications unless he had evidence that indicated that there was a leak where the caulking was to be done? [401]

A. He might possibly recommend a certain amount of caulking to be done, where there was no evidence of leak, on general principles he might consider that the waterway seam of the ship might possibly be strained. If any seam was strained in the ship, if the vessel was strained, to use every precaution possible, he might recommend the waterways seams be caulked and several seams next to

(Testimony of S. B. Gibbs.)

each hatch course, to be absolutely on the safe side.

Q. If the surveyor recommended certain seams be caulked, in your judgment would he either have knowledge of the existence of a leak in that seam, or be suspicious of the fact that a leak might exist there?

A. Yes, he might be suspicious *that existed* there.

Q. Would he either have knowledge or a suspicion that a leak might exist there? A. Yes, sir.

Q. Now, I will ask you whether or not the following provision in the original specifications would cover the caulking of the leak in the seam at the stern post, the original specifications provide: "Gar-board seams on both sides, hood-ends of planking and all butts of bottom and topsides to be thoroughly calked, seams painted and cemented." I will ask you whether or not the seam at the stern post would be covered by the specifications in the caulking of the hood-ends? A. It would.

Q. And if the "Nottingham" stranded at her forefoot, before she proceeded to sea, on soft bottom, I will ask you whether or not in your judgment, that would strain the seams around the stern post so as to cause her to leak [402] as you say this seam leaked? A. No, I do not think it would.

Q. When the "Nottingham" was in the drydock at the Port of Portland, how high above the floor of the dock would this seam be?

A. It would be the draft of the ship plus the depth of the keel blocks. It would be about 24 feet.

Q. How far in from the extreme stern of the ves-

(Testimony of S. B. Gibbs.)

sel, as shown in exhibit 3, would the leak be?

A. I should judge about 12 or 14 feet.

Q. Would it be possible to see that seam and inspect that seam from the vessel while she was in the dock?

A. No, not without a sufficient staging.

Q. What would be necessary in order to get up to the seam so as to inspect it, while the vessel was in the dock?

A. It would take ladders or very high staging.

Q. You testified that you were instructed by the Firemen's Fund to take up matters in dispute with Mr. Walker. I will ask you if the matters in dispute between you, which you did consider are those which are embodied in the agreement entered into between you marked "5a," were the matters which are covered by yourself and Walker's agreement of March 27th,—were the matters in dispute considered by the two of you?

A. Yes, it includes all these matters.

Q. Were they or were they not the matters instructed by the Firemen's Fund to take up with Mr. Walker? A. They were the matters.

Q. Now, when you went to Portland, was there any disagreement between you and Mr. Walker and Captain Crow, as to [403] the necessity of this new deck caulking which he had brought in in his supplemental report and the caulking of the plank-ing of the vessel?

A. Yes, there was a disagreement.

Q. Were you able to agree with Walker that that

(Testimony of S. B. Gibbs.)

planking in the entire deck needed recaulking as the result of damages suffered by this accident?

A. No.

Q. Did you show Captain Crow Walker's supplemental report? A. I do not think I did.

Q. Did you see Captain Crow at any time prior to that visit of May second?

A. No. I saw him for a few minutes here in Seattle when he came over to meet Mr. Taylor, but I did not discuss the case with him at all.

Q. You furnished Mr. Page with what purported to be a copy of the supplemental report that Walker had given you, didn't you? A. Yes, sir.

Q. (Mr. BOGLE.) Captain, when you and Mr. Walker were making these investigations on May second and third, did you call his attention to this open seam that you have testified about?

A. Yes, I spoke to him about it.

Q. Was the repair of that seam covered by any of the specifications?

A. Well, the specifications call for the hood-ends to be caulked; that would take care of these seams.

Q. Did Mr. Walker know about that open seam before you [404] called attention to it?

A. I think he did know something about it, but he claimed it was not as large as when I saw it.

Q. That is he claimed it was not as large in December as in May?

A. I do not know just what time he saw it, but he intimated to me, as I recollect now, that he knew of the existence of this seam in this condition, or rather

(Testimony of S. B. Gibbs.)

in an open condition.

Q. But not in the condition it was when you were down there?

A. That is what he stated to me. The seam itself—I want to go a little further—the seam was not only open but very slack all up above it, which accounts for the water coming in there in such large quantities. I do not want it confined to the open space all under there, but it was very slack above it.

Q. You mean for a further distance?

A. Yes, sir.

Q. Was it slack enough to admit water through it?

A. It was, yes, sir.

Q. And you say that is not attributable to the fact that the vessel had been lying exposed to the sun all these months?

A. I would not say that it was, from the fact that the sun did not reach it under there, the seam was in such a position on the ship, being under the quarter, it is pretty well protected from the sun. I do not think it would have any effect on it.

Q. Can you give any explanation at all, Captain, of the existence of that seam?

A. The explanation I would give, when the vessel was caulked [405] that seam was slighted. I have seen so many cases. It is too hard work to put the staging up and sometimes it is slighted.

Q. If the vessel had been caulked in 1908, it had been in that condition for three years?

A. Yes, sir.

Q. And you say this was under the water-line

(Testimony of S. B. Gibbs.)

when loaded; would it not flood the vessel?

A. There might be enough oakum in there to keep the water out.

Q. If your explanation is correct, Captain, she was not in any worse condition, practically, when she started on this voyage, than she had been on all the preceding voyages after the last caulking?

A. The caulking does not improve any with age.

Q. Well, if the defect was there, and the caulking was not put in when she had been previously caulked, and that was the trouble, her condition practically was the same during all these years?

A. No, there might have been some oakum come out before she started on the voyage.

Q. It might have come out when lying here at this drydock?

A. Yes, I would not say that it was not.

Q. Just as likely to come out then as any other time, was it not, Captain?

A. Yes, I believe it would.

Q. Now, Captain, you say that you and Walker went down on the second or third of May?

A. Yes, sir.

Q. You went pursuant to the understanding of the conference between the representatives of the Firemen's Fund and the [406] representatives of the Globe Navigation Company, to see if you and Walker, after looking over these defects on the ship, could come to an agreement? A. Yes, sir.

Q. And I understood you to say, in answer to Mr. Campbell, that the results of that examination made

(Testimony of S. B. Gibbs.)

by you and Mr. Walker were embodied in this joint report on both sides. A. Yes, sir.

Mr. CAMPBELL.—That survey was dated March 27, and they were there May 2d.

A. I am mistaken.

Q. That is all I called your attention to, this embodied the result of that?

Mr. CAMPBELL.—That is not the result of the conference and general inspection by you and Walker made pursuant to request in May shown by exhibit “5a”? A. No.

Q. When you signed this, you had never seen the ship? A. Never seen the ship.

Q. Now, you say that you furnished Mr. Page with a copy of Walker's supplemental report?

A. Yes, sir, I believe I did; to the best of my recollection.

Q. When was that, Captain?

A. I do not remember when it was.

Q. Well, was it about the time of this inspection?

A. I do not recollect when I furnished it to him. I cannot remember all these details.

Q. Mr. Page was there when you made the inspection? A. Yes, sir.

Q. And you were there to look into these very questions Walker [407] had pointed out in his supplemental report? A. Yes, sir.

Q. And you had a copy of the report? A. Yes.

Q. And at some time at least you did give it to Page? A. Yes, sir.

Q. That was not recently, was it? A. No, sir.

(Testimony of S. B. Gibbs.)

Q. Somewhere about that time?

A. Somewhere about that time.

Q. And so far as you know, the Firemen's Fund or the representatives of it, have had that report ever since? A. As far as I know.

Q. (Mr. CAMPBELL.) How does age affect the caulking of a boat? A. Age deteriorates it.

Q. If this caulking drooped out while the vessel was in the drydock, or docked at Portland, what must have been the condition at the time that the vessel sailed? A. Very poor condition.

Q. To clear up the confusion which has been introduced in the record by counsel, I will again ask you, as I did on direct examination: If this agreement between yourself and Walker, under date of March 27th, embodies these matters, why were you instructed by the Firemen's Fund Insurance Company to take up and consider with Mr. Walker—

A. It does—

Q. And the inspection of the vessel in May, 1912, was entirely a different matter and subsequent to that period? A. Yes, sir. [408]

Q. (Mr. BOGLE.) I want to get that straight. Now, Captain, you went down there in May, 1912, to make this joint inspection with Walker?

A. Yes, sir, I went down there at the request of Mr. Page, at that time.

Q. To make this inspection, to meet Walker there at the time in making an inspection, whether it was a joint one or not, was that your instruction?

A. I do not know as I had, when I come to think

(Testimony of S. B. Gibbs.)

it over, any definite instructions at the time. I think Page requested me to go down and arrange with Thorndyke for Walker to go down, that is my best recollection now.

Q. Now, is it not a fact under your instructions, to go over these matters with Walker, and see what should be done, in order that you could give the Firemen's Fund the benefit of your judgment?

A. Yes, I think it was.

Q. That was entirely a matter of inspection?

A. Yes.

Q. And had nothing to do with this March 27th report? A. No.

(Testimony of witness closed.) [409]

[Testimony of Charles R. Page, for Defendant.]

CHARLES R. PAGE, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Q. (Mr. CAMPBELL.) What is your present position, Mr. Page?

A. I am in charge of the marine loss department of the Firemen's Fund Insurance Company.

Q. How long have you been engaged in that business? A. Nearly 12 years.

Q. As part of your duties, did you ever have occasion to examine the adjustments of losses, both as to general average and particular average losses?

A. I have to examine a great many such adjustments.

Q. Do you hold any official position, aside from your connection with the Firemen's Fund Insurance

(Testimony of Charles R. Page.)

Company, which calls for your examining adjustments?

A. Yes, I am a member of the adjustment committee of the Board of Marine Underwriters of San Francisco.

Q. Do you know the firm of Johnson & Higgins?

A. I do, very well.

Q. What position do they occupy as adjusters on the coast? A. Probably the foremost position.

Q. Were you present at a conference in Mr. Clise's office in Seattle at which Judge Bogle and myself were present? A. I was.

Q. Did you at that time have Mr. Walker's supplemental report? A. I did not.

Q. Were you afterwards furnished a copy?

A. I was.

Q. By whom? A. By Captain Gibbs. [410]

Q. When was that?

A. That was about the 6th day of May, when I was in Portland with Captain Gibbs.

Q. What did you do with that copy?

A. I took that copy with me to San Francisco, and had a copy made in our office, of it.

Q. Have you the copy that was made in San Francisco? A. I have.

Q. I hand you a document and ask you what it is?

A. That is the copy made in our office, of Mr. Walker's supplemental survey report, which had been handed to me by Captain Gibbs.

Q. What did you do with the copy that Captain Gibbs handed to you, after this one was made?

(Testimony of Charles R. Page.)

A. I returned it to Captain Gibbs.

Q. I will ask you to compare this copy, which was made in your office, with the copy which was produced by the libelant here and marked exhibit "J," and ask you if there is any discrepancy between the two copies?

Mr. CLISE.—I object for the reason that they are both printed documents and they will speak for themselves, and it is not necessary for the witness to interpret them or to explain anything that is apparent from the reading of the two documents.

A. There is one discrepancy, yes, in the first paragraph of the copy of Mr. Walker's supplemental report which was produced here by Mr. Clise, I presume, or Mr. Walker, exhibit "J," there appears the following "And was unknown previous to September 26th, 1911," whereas, in the copy which was made in our office, there appears the following [411] "And was known previous to September 26th, 1911."

Q. What is being referred to?

A. A concealed damage in the ship of serious leakage. Otherwise I believe them to be the same.

Q. The prices appear on your copy. Do they appear on the one produced by Walker?

A. I cannot state as to that.

Q. Do they?

A. They do not appear in Walker's copy.

Q. When you made *requestion* upon Johnson & Higgins for the production of a copy of that survey report, will you state whether it was or was not, on

(Testimony of Charles R. Page.)

or about that time, that you noticed the fact that your survey report stated that the leakage was known on September 26th, 1911?

A. No, it was not at that time.

Q. When was it? A. Subsequent to that.

Q. Were you present at the time that Captain Gibbs has testified to, when the rule was inserted in the seam at the stern post at Portland?

A. I was, yes, sir.

Q. Did you see the rule inserted?

A. I did, yes.

Q. How far was it put into the seam?

A. I should say about five inches.

Q. By what means were you able to get so that you could reach the seam?

A. By standing on top of the cabin of a launch belonging to the Port of Portland, I believe.

Q. Did you, at that time, take any measurements, or record any [412] measurements that were taken in your presence by Captain Gibbs and Captain Crow, of the deck seams in the "Nottingham"?

A. I recorded such measurements, yes.

Q. Have you that memorandum with you?

A. I have, yes.

Q. Will you produce it?

(Witness does so.)

Q. Will you read them into the record?

A. May 3d, "William Nottingham." Length of main deck 130 feet, seams between hatches 38.

Mr. CLISE.—I would like to have it appear in the record that it is incompetent and immaterial as to

(Testimony of Charles R. Page.)

what the condition of the "Nottingham" was on the 3d day of May, 1912. That the only question in issue is the condition of the "Nottingham" as she appeared in Astoria harbor on the 14th, 15th and 16th days of October, 1911.

Mr. CAMPBELL.—I am asking for the lineal length of the deck seams. I want to show how close your surveyor, Mr. Walker, guesses about it this morning, when he said there was a duplication of five per cent.

Mr. CLISE.—I want this objection to go to all testimony that relates to the then condition of the "Nottingham" as she appeared at the time of this inspection, rather than to make my objection as each question is asked.

A. (Continuing.) Measuring 3772 feet. Seams outside the hatches 76, measuring 9880 feet. I have the total 13,652 feet. Waterways 1560 feet. Hatch coaming 60 feet. Break of poop 40 feet. Break of forecastle 40 feet, yielding a total of 15,352 feet.
[413]

Q. Was that the combined length of all the seams in the main deck of that vessel? A. Yes, sir.

Q. Now, did you take any measurements of the combined length of the seams in the main deck of the vessel, which were covered by the original specifications? A. I took no such measurements.

Q. Did you record the measurements which were taken by Captain Gibbs and Captain Crow, in your presence? A. I did, yes.

Q. Have you that memoranda present?

(Testimony of Charles R. Page.)

A. I have, it is right here.

Q. Read it into the record, please?

A. 8 seams and 2 seams, total 10 seams 130 feet, 1300 feet. Hatch coaming 60 feet. Waterways 520 feet. Total 1880 feet.

Q. What is the difference, Mr. Page, between the combined length of the seams provided to be caulked under Walker's supplemental survey and the combined length of the seams which were to be caulked under the original specifications? A. 13,472 feet.

Q. Captain Gibbs testified that they gave you a memorandum of the total combined length of the seams between the outside planking of the vessel.

A. They did so.

Q. Have you that memorandum that you made at that time? A. I have.

Q. Will you read it into the record, please?

A. From the load line to the bulwarks on each side 17 seams, 215 feet long, yielding 7310 feet in all. That is from [414] the load line to the bulwarks.

Q. Were these seams above the water at that time?

A. They were all above the water at that time, yes.

Q. Did the vessel have any cargo in her at that time? A. No, none at all.

Q. What condition did you observe the cement in the seams between the outside planking to be at that time?

A. Cracked and much of it missing at that time.

Q. What was the condition of the planking itself?

(Testimony of Charles R. Page.)

A. To a certain extent, shrunk.

Q. What was the condition of the deck planking, deck seams?

A. The deck seams also showed cracks in the pitch. I cannot state as to the condition of the deck planks; I do not recollect particularly what that condition was.

Q. Was there any comparative difference between the seams between the planks on the port side and on the starboard side of the vessel?

A. There was, yes, sir.

Q. Which seams were in the worse condition?

A. Those on the starboard side.

Q. Which side was the most exposed to the sun?

A. That side.

Q. When you went first aboard the "Nottingham" at St. Johns, did you receive any permit?

A. Before I left Seattle, I secured a letter from Mr. Thorndyke to the keeper of the dock that would authorize me to go aboard the vessel.

Q. What did you do with that letter?

A. I am not certain whether I surrendered that to the man there or not? [415]

Q. Have you it at the present time?

A. I think not.

Q. Did you record any measurements of the draft of the seam at the stern post? A. I did, yes.

Q. What did you record? A. 21 foot mark.

Q. Did you make any record of the draft of the vessel at time, her loaded draft?

A. I made a record of what I was told was her

(Testimony of Charles R. Page.)

load draft when she sailed.

Q. What was that?

Mr. CLISE.—I object as incompetent, irrelevant and immaterial and hearsay.

Mr. CAMPBELL.—I am not seeking to prove what her loaded draft was. I want to show the difference of four inches between the draft of the seam and the loaded draft as given to him at that time.

A. 21 feet 4 inches.

Q. What was the loaded draft given to you at that time?

A. I have just given it to you, 21 feet 4 inches at the load draft.

Q. Do you recollect who gave you that draft?

A. Captain Crow.

Q. I hand you a document and ask what that is?

A. That is a report of survey of the schooner "William Nottingham," signed by Albert Crow, surveyor of the Board of Marine Underwriters of San Francisco, at Portland, under date of December 23, 1911.

Q. Is Captain Crow now alive? [416]

A. Captain Crow is dead.

Mr. CAMPBELL.—Now, I hand this survey report to counsel, with the understanding that Captain Crow is dead, and that it is not admissible as competent evidence on my part, and call their attention to the fact, that in this report Captain Crow points out the existence of the leak in the seam at the stern post of the "Nottingham," and ask their permission

(Testimony of Charles R. Page.)

to introduce the report in evidence.

Mr. CLISE.—We will consider that. And I suppose that the statement that counsel has just made of its contents, is not intended to be considered as evidence in the consideration of this case.

Mr. CAMPBELL.—No, sir. I do not want anything in the record that is not proper.

Q. I call your attention to a document and ask you to state what it is?

A. That is a copy of a night letter received from Captain Crow, just referred to, of Portland, under date of December 21, 1911, by the secretary of the Board of Marine Underwriters of San Francisco.

Mr. CAMPBELL.—We will produce the original of that and will ask if counsel will also admit that telegram in evidence. I want the record to show this: That these documents show a report by Captain Crow of the existence of the open seam at the stern post. And my only purpose in asking it, is that your examination of Captain Gibbs contained an inference of the manipulation of that seam, as I understood the question.

Mr. CLISE.—I move that the statement of counsel be stricken on the ground that it is incompetent and a self-serving [417] declaration, to get into the record something that he cannot get in, in the ordinary way of proof.

Mr. CAMPBELL.—I am not asking for a consideration by the Court of the contents of these documents. I am simply asking if counsel will admit the same. I want it specially understood that the

(Testimony of Charles R. Page.)

Court is not to take them into consideration.

Mr. CLISE.—We consent that you read the letter into the record.

Q. Read the telegram into the record.

A. "Bottom ship shows no sign of straining due to stranding Westport creek. Port garboard chafed almost full length. Will smooth off little expense. Vessel's hull shows slight trace having touched bottom. Stern post seam on 20-foot mark, space 6 inches long, no oakum whatever. This space and backs of stanchions and covering boards admitted practically all the water. Recommend all butts, garboards, stern post, stern seams, corked. Also seams showing cement loose above load line be cemented. Also about 3,000 feet seams corked on main deck. Cost for repairs will be less than former estimate. Vessel has been floated. Owner prepared specifications for repairs will be submitted to me. Believing they have no claim, will not waste time on them unless you so direct."

Mr. CAMPBELL.—That is all I care to ask about it now, Mr. Clise. When there is a segregation made, as we will make it at Portland, of the bids, I shall want to examine him there, as to the principles upon which the adjustment as to partial loss is made, under the terms and conditions of the policy covering this vessel, for the purpose of figuring the cost of repairs necessary to constitute a [418] constructive total loss of the vessel giving you the right to abandon her. Would you prefer to have that now, or to wait until we get to Portland. If we go on with

(Testimony of Charles R. Page.)

it now, it will necessitate a duplication of the testimony, in my judgment.

Mr. CLISE.—I would like to cover as much here as possible, so that we will be delayed at Portland as little as we can.

Cross-examination.

Q. (Mr. CLISE.) You did not see the vessel until you examined her at St. Johns in May?

A. Not until the 3d of May.

Q. So that all your statements are based upon the condition that the vessel was in, at that time?

A. All my statements going to the condition of the vessel are based on the condition in which she was at that time.

Q. And the fact that the conditions of the star-board side were in some respects worse than those on the port side, was due to the weather that she had encountered during the time that had elapsed since October until the time you examined her?

A. Since October, what do you mean by that? Since she was returned to Astoria?

Q. Yes. A. In my estimation, yes.

(Witness excused.) [419]

Mr. CAMPBELL.—I offer in evidence the letters produced by Mr. Thorndyke, as having been exchanged between himself and Johnson & Higgins, relative to the production of the Walker supplemental report, with respect to which he was questioned this morning.

Letters marked Defendant's Exhibits "11" and "12," respectively, filed and returned herewith.

(Testimony of Charles R. Page.)

Mr. CAMPBELL.—I also offer copy of the report of Walker which was referred to as having been made in Mr. Page's office.

Paper marked Defendant's Exhibit "13" filed and returned herewith.

(Hearing adjourned.) [420]

Seattle, Wash., Aug. 30, 1913.

Present: Mr. CLISE and Mr. BOGLE, for the Plaintiff.

Mr. CAMPBELL, for the Defendant.

[Testimony of C. M. Nelson, for Defendant.]

C. M. NELSON, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Q. (Mr. CAMPBELL.) Where do you live, Mr. Nelson? A. Portland, Oregon.

Q. What business are you in?

A. Building steamboats and barges.

Q. How long have you been a ship builder?

A. I have been working at it for forty years.

Q. What class of vessels do you build, wooden vessels or steel? A. Wooden vessels, all wood.

Q. Will you tell me what, in your judgment, the prevailing price for calking was, in Portland, in the fall of 1911? A. The price of calking?

Q. Yes, sir. A. By the foot?

Q. Yes, sir.

A. I should judge about seven cents.

Q. Did you in December of 1911, examine the schooner "William Nottingham" while she was on the drydock at the Port of Portland drydock?

A. Yes, sir.

(Testimony of C. M. Nelson.)

Q. At whose request did you make that examination? A. Mr. Talbot.

Q. What condition did you find her bottom in?

A. I found it in first-class condition. [421]

Q. Did you examine her in the region of her fore-foot? A. Yes, sir.

Q. Did you find any evidence of damage from stranding? A. None, whatever.

Q. Did you examine along her bottom?

A. Yes, sir.

Q. What was it? A. The bottom was good.

Q. Did you find any evidence of stranding?

A. No, sir, not at all.

Q. Did you examine this seam at the hood-ends along the stern post?

A. Well, as far up as we could see from the dock. I did not get up under the counter of her.

Q. In what condition did you find her outside calking to be? A. Very good.

Q. In what condition did you find her deck calking to be?

A. The decks were very good. All except probably a little loose along the covering board.

Q. What else do you call it, the covering board, the waterways? A. The waterways, yes.

Q. Did you examine her again in May, 1912?

A. Yes, sir.

Q. How did the condition of her outside seams at that time compare with what they were when you examined her in December?

A. Well, she seemed to have been dried up con-

(Testimony of C. M. Nelson.)

siderably. On the sunny side. She laid broadside to the sun for [422] several months and it seemed to burn the paint off and dry the wood up some.

Q. How did her deck seams in May compare with her condition as you observed them, in December?

A. They were naturally dried up about the same as the side. They had no water on her.

Q. Which side was exposed to the sun?

A. The starboard side.

Q. Where was she when you examined her in May?

A. She laid outside of the drydock, up against the dock, up against the wharf.

Q. Did you see this seam at the stern post at that time? A. No, sir, I did not see that seam.

Cross-examination.

Q. (Mr. BOGLE.) Who was Talbot?

A. He was manager of the Port of Portland.

Q. This examination of yours was made at his request, in the interest of the Port of Portland?

A. Yes.

Q. During the time that she was under the libel for salvage suit instituted by the Port of Portland?

A. Yes, sir.

Q. What was the purpose of that examination?

A. Well, I understood that she had grounded on the river and they wanted to see if the Port of Portland was responsible for it or any damage done, that was the part I was sent down to see.

Q. Do you know, Mr. Nelson, whether the frame work or the upper works were strained by the pulling of the tugs [423] at the time she was stranded?

(Testimony of C. M. Nelson.)

A. No, I am sure in my own mind there was no straining for that reason.

Q. Well, she had a very heavy cargo both under deck and on deck? A. Yes.

Q. And she was stranded there from one high tide to another? A. Yes, sir.

Q. And it was a pretty heavy pull to get her off?

A. It would not hurt the ship any.

Q. As a matter of fact what you examined was her bottom? A. Yes, sir.

Q. You did not examine her to see whether her frame work was strained at any part? A. No.

(Testimony of witness closed.) [424]

Seattle, Washington, September 2, 1913.

Present: Mr. CLISE and Mr. BOGLE, for the Plaintiff.

Mr. CAMPBELL, for the Defendant.

**[Testimony of S. B. Gibbs, for Defendant
(Recalled).]**

S. B. GIBBS, recalled on behalf of the defendant, testified as follows:

Q. (Mr. CAMPBELL.) Are there any corrections in the testimony you have given on former hearings in this case?

A. Yes, I would like to correct my statement in regard to the toilet pipe.

Q. Go ahead and make such corrections as you desire.

A. I would like to state that the toilet pipe is three inches above the water when the vessel is loaded, in-

(Testimony of S. B. Gibbs.)

stead of being under water, as I stated previously.

Q. That is when she was on an even keel?

A. When she was loaded.

Q. In your judgment would that flange to the toilet pipe be put under water when she was on the star-board tack with a good sailing breeze?

A. It would.

Q. I will ask you, Captain, whether or not in your judgment, it would be possible to so fasten the planks of a vessel on to her stern post as to make the seams between the ends of the planking and the stern post water-tight without corking them?

A. I do not think it would. [425]

Cross-examination.

Q. (Mr. BOGLE.) Do you know the plans of the vessel and the frame work at that point?

A. No. I know the ordinary plans of a vessel of that kind. The stern post is rabbetted and the planks are fastened on to the rabbetting.

Q. Now, you were surveyor for the San Francisco Underwriters. How long have you been their surveyor? A. About eleven years and a half.

Q. You have attended all of the sessions before the Commissioner taking testimony in this case?

A. I think I have, most of them.

Q. And have been aiding and assisting proctor for the respondent in this case?

Mr. CAMPBELL.—I will admit I have asked Captain Gibbs his opinion on various matters that came up.

A. I do not know whether I have aided and as-

(Testimony of S. B. Gibbs.)

sisted him very much.

Q. You have sat by and conferred with him and made suggestions in the course of the examination of all the witnesses.

A. I do not think all of them. I think I may have made a few suggestions.

Q. You are doing that in the interest of the Underwriters? A. Yes, sir.

Q. (Mr. CAMPBELL.) I have asked you from time to time during the hearing, have I not, as to your opinion on certain matters that have developed?

A. You have.

(Witness excused.) [426]

Seattle, Washington, Dec. 29, 1913.

Present: Mr. CLISE and Mr. BOGLE, for Plaintiff.
Mr. SHORTS, for Defendant.

[**Testimony of Frank G. Taylor, for Defendant.**]

FRANK G. TAYLOR, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Q. (Mr. SHORTS.) Your name is Frank G. Taylor? A. Yes, sir.

Q. You are a resident of Seattle, Washington?

A. Yes, sir.

Q. I will ask you, if on October 1st, 1911 and at all times since, you have been general agent for the State of Washington for the Marine department of the Firemen's Fund Insurance Company?

A. Yes, sir.

Q. With offices in the Colman building in this city?

(Testimony of Frank G. Taylor.)

A. Yes, sir.

Q. Mr. Taylor, Mr. Thorndyke, of the Globe Navigation company, states in his testimony taken in this case, that on Saturday, October 14th, 1911, he had some conversation with you over the telephone, you being, as he states, at that time in your office in the Colman building, concerning the schooner "Nottingham" and the trouble that she met off the Columbia bar. I will ask you to state whether you remember having any such conversation with him on that date?

A. No, I was not in Seattle on the 14th of October, that is, I left Seattle on the nine o'clock boat for Tacoma.

Q. What boat did you go over on?

A. I went over on the 9 o'clock "Indianapolis."

[427]

Q. And were in Tacoma how long that day?

A. I left there at seven o'clock in the evening.

Q. What time did you return to Seattle?

A. I got over here about a quarter of nine in the evening.

Q. Were you in your office at any time that day?

A. After nine o'clock in the morning?

Q. Between nine o'clock in the morning and nine o'clock in the evening?

A. No; I do not think I was at the office at all that day.

Q. Did you have any such conversation with Thorndyke on that date? A. No, none whatever.

Q. When was the first that you ever heard from

(Testimony of Frank G. Taylor.)

Thorndyke relating to this matter?

A. He came in Monday morning, the 16th and discussed the case at that time.

Q. He came in, in the morning, on Monday the 16th, you state? A. Yes, sir.

Q. Did he, at that time, give you any notice of his intention of his company, of abandoning this vessel?

A. None whatever. The matter was not discussed at that time at all.

Q. What was discussed at that time?

A. Oh, general conditions. Simply talking about the trouble the vessel had had. No one knew at that time the extent of her damages. He came in, in the afternoon, however, of the same day and presented me with a letter of abandonment.

Q. That is on the afternoon of Monday, October 16th, [428] 1911? A. Yes, sir.

Q. Did you at any time, on Saturday October 14th, 1911, hear from any source of the trouble that had come to the schooner "Nottingham"?

A. Yes. When I got home. I don't know how long after I got home, possibly an hour, the Merchants' Exchange called me up, as they very often do in the evening, to give me any items that may be of interest, and advised me that the vessel had been in trouble off the Columbia River bar.

Q. You received that information by telephone?

A. I received that information by telephone.

Q. Where were you at the time you received it?

A. At my home.

Q. Where? A. In this city.

(Testimony of Frank G. Taylor.)

Q. What time of night was it you received it?

A. I would be unable to tell what time it was; but I should say possibly ten or half past ten at night.

Q. Was that the first information you had received from any source of the trouble that came to the "Nottingham"?

A. That was the first information I had received that the vessel was in any trouble.

Q. Was your wife in the city at that time?

A. No. My wife and family were in Spokane.

Q. Was there any one at your home during the day of October 14th, 1913?

A. The maid might have been at the house.

Q. I ask you, Mr. Taylor, do you keep a diary from day to [429] day? A. I do.

Q. Of your daily transactions?

A. I do, of the more important things that happen during the day.

Q. Did you keep a diary during the year 1911?

A. I did.

Q. I ask you to turn to your diary and to the page therein that shows your movements on October 14th, 1911, and state by whom the entries that appear on that page were made? A. Made by me.

Q. Are they in your own handwriting?

A. They are.

Q. When did you enter that in your diary for that day? A. You are speaking of the 14th?

Q. Yes, sir.

A. The entries on the 14th I would say were made on the Monday morning following.

(Testimony of Frank G. Taylor.)

Q. I will ask you to remove that page from the book, Mr. Taylor. (Witness does so.) What is the entry on the back of the page?

A. That is for Sunday, the 15th.

Q. Of October, 1911? A. Yes.

Q. I will ask you if these entries have been modified or changed in any way since the time they were made? A. Not at all.

Mr. SHORTS.—I offer this in evidence.

Paper marked Defendant's Exhibit "18," filed and returned herewith. [430]

Q. Will you read the entries that appear under date of Saturday, October 14th, 1911?

A. (Reading:) Left for Tacoma at 9 A. M. on "Indianapolis."

Went first to International Fisheries Company where I collected Zapora premium and had most insulting experience with Morse.

Called on Mr. Ireland of Alaska Coast Co. about premiums Jeanie & Bertha which he promised substantial payments on before end of next week.

Called on Arthur and discussed property interests.

Mother and Father's anniversary tomorrow.

Had dinner with them to-day and spent afternoon.

Left for Seattle on 7 o'clock "Indianapolis." Arrived Seattle 9 P. M. and went home.

Schooner "Wm. Nottingham" reported water-logged and abandoned off Oregon coast full cargo lumber.

Q. What does that last entry "Schooner 'Wm. Nottingham' reported water-logged and abandoned

(Testimony of Frank G. Taylor.)

off Oregon coast, full cargo of lumber'' refer to?

A. It refers to the message I got from the Merchants' Exchange, late at night. That was the last thing I got.

Cross-examination.

Q. (Mr. BOGGLE.) Mr. Taylor, do you remember the message from the Merchants' Exchange aside from the fact that you see an entry in the diary in regard to it?

A. No, I do not, any more than Hill has been in the habit of calling me up at the house at night and reports certain damages, certain cases of disasters.
[431]

Q. It is an inference of yours that you got the information from the Merchants' Exchange, is it not?

A. Well, I feel very positive that I got it from the Merchants' Exchange.

Q. There is no such entry on your diary that you got it there? A. No.

Q. And you have no independent recollection about it? A. No, I have not.

Q. Are you prepared to say, after this lapse of time, that you did not get that information from Mr. Thorndyke? A. Absolutely.

Q. Why is it you are so positive of that, Mr. Taylor?

A. Because I know I was in Tacoma on that day. I know the time I left for Tacoma and I know the time I got back from Tacoma, and I would clearly remember if Mr. Thorndyke had telephoned my

(Testimony of Frank G. Taylor.)

house and would have put it in my diary.

Q. It is a fact that you got the information of the disaster to the "Nottingham" sometime on the day or night of the 14th of October?

A. At night, yes, sir.

Q. And you base the fact that you got it at night from the fact that it is the last entry on the diary?

A. I do.

Q. And you think you got it from the Merchants' Exchange because you are of the impression that you would have recollected if Mr. Thorndyke had personally communicated it to you?

A. It is the custom of the Merchants' Exchange to [432] telephone, and they do telephone me at night. I would not, on a message of that kind, ordinarily put on my diary the fact that I had got it from the Merchants' Exchange.

Q. Why would you not mention the source of your information if it came from them as well as if from other people.

A. The fact that it was reported would almost mean to me that it was the Merchants' Exchange reported it.

Q. It is the custom of owners to report disasters to their vessels, is it not?

A. It is the custom to report to underwriters.

Q. To you, as representative of the underwriters?

A. It is customary.

Q. Very common thing, is it not? A. Yes, sir.

Q. It would have been in the ordinary and usual course of things for Thorndyke to communicate any

(Testimony of Frank G. Taylor.)

information he received, as soon as convenient after he got it? That would have been the ordinary course of dealings would it not?

A. Whether he would communicate to me after nine o'clock at night I would think not.

Q. Well, if you had been out of your office during the business hours throughout the day, it would have been the natural thing for him to do, would it not?

A. Why, I would not think it was to call up a man's home after nine o'clock at night.

Q. Would there be anything out of the way any more for him to do it than the Merchants' Exchange, who had no interest in the matter? [433]

A. No, not a bit.

Q. The fact is, according to your impressions, somebody did communicate that information to you?

A. No question about it.

Q. Did you get any further information about it the next day, Sunday?

A. The only things I got was probably from the papers. I might have read it in the papers. It was in the papers of the 15th.

Q. You say the first time you saw Thorndyke was Monday morning. A. Monday morning, yes, sir.

Q. And he talked over the disaster with you at that time? A. He did, he reported the accident.

Q. Had the vessel been returned to port at that time? A. I do not think so.

Q. You have no recollection of that?

A. I do not think so. I think not. I think she had not been returned to port. She was then in tow

(Testimony of Frank G. Taylor.)

of the Port of Portland tug.

Q. The only information you got either Saturday or Monday morning, so far as your recollection is, that she had had a disaster and had been abandoned at sea, and possibly after she had been picked up by some tug.

A. That was the part that I got, that she had been abandoned by her crew.

Q. Now, the information that you got Saturday, there was no report that she had been picked up by a tug, was there? A. No.

Q. And was there any such information Monday morning? [434]

A. Mr. Thorndyke gave me the information Monday morning.

Q. That she had been picked up by a tug?

A. By a tug.

Q. The formal notice of abandonment was given Monday afternoon?

A. Monday afternoon. Thorndyke came into the office and served notice on me; I remember the instance very well indeed.

Q. Mr. Taylor, what entry did you make in your diary of the interview with Thorndyke on Monday?

A. (Reading:) "Schooner 'Wm. Nottingham' reported picked up by Port of Portland tug 'Walula' and brought into Astoria. Schooner was water-logged and abandoned when picked up.

Thorndyke called and we discussed 'Nottingham' case.

Gibbs and I discussed 'Wm. Nottingham' accident.

(Testimony of Frank G. Taylor.)

Globe Navigation company through Thorndyke served notice of abandonment of schooner, which I declined by letter.

Thorndyke left for Portland at 4:15 P. M.

I wired A. F. regarding abandonment.

Had two letters from Nan.

Spent evening at home alone, catching up on correspondence for office.

C. P. R. S. S. 'Princess Beatrice' ashore north end Vancouver island. Full cargo salmon."

Q. It would appear from that entry, Mr. Taylor, that when Thorndyke called Monday, he did inform you that the "Nottingham" had been picked up by a tug? A. He did inform me? [435]

Q. Yes. A. I think he did.

Q. And it is your recollection that you never had an interview with Thorndyke until after the tug had picked up the "Nottingham"?

A. That is my recollection.

Redirect Examination.

Q. (Mr. SHORTS.) Are you positive, Mr. Taylor, that the first conversation you had with Mr. Thorndyke concerning this disaster to the "Nottingham," either personally or over the telephone, was when he called on you at your office in the Colman building on Monday the 16th of October, 1911?

A. I am.

Mr. SHORTS.—I offer in evidence this page from his diary of Monday, October 16th, 1911, as an exhibit.

Paper marked Defendant's Exhibit "19," filed and returned herewith.

(Testimony of witness closed.)

Hearing adjourned. [436]

United States of America,
Western District of Washington,
Northern Division,—ss.

I, A. C. Bowman, a Commissioner of the United States District Court, for the Western District of Washington, residing at Seattle, in said District, do hereby certify that

The foregoing transcript, from page 1 to page 305, both inclusive, contains all of the testimony offered by the parties before me in said matter.

The several witnesses, before examination, were duly sworn to testify the truth, the whole truth and nothing but the truth.

I reduced the testimony to writing in shorthand and thereafter caused the same to be typewritten, and I certify that the testimony returned herewith is the testimony given by the several witnesses at the times therein indicated.

Proctors for the parties waived the reading and signing of the testimony given by the witnesses, agreeing that when returned into Court by me that it should have the same force and effect as if so read and signed by them.

The several exhibits, as shown in the transcript and index, are returned herewith.

I certify that I am not of counsel nor in any way interested in the result of this suit.

Witness my hand and official seal this 2d day of
November, 1914.

[Seal]

A. C. BOWMAN,
U. S. Commissioner. [437]

COMMISSIONER'S TAXABLE COSTS:

Plaintiff:

Hearings July 30, 31, Aug. 30, Sept. 2, 3,	
1913.....	\$15.00
Administering oaths to 4 witnesses.....	40
Marking and filing 17 exhibits.....	1.70
Transcript above hearings, 625 fo. at 10c..	62.50
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	\$79.60

Defendant:

Hearings July 31, Aug. 30, Sept. 3, Dec. 29	
1913.....	\$12.00
Administering oaths to 3 witnesses.....	.30
Marking and filing 19 exhibits.....	1.90
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*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

GLOBE NAVIGATION COMPANY,
Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
Respondent.

Tuesday, Nov. 11th.
Wednesday, Nov. 12th.
Thursday, Nov. 13th.

Reporter's Transcript.

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CHARLES R. GAGAN,
EDWARD W. LEHNER,
Official Reporters, 329 P. O. Building.

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

GLOBE NAVIGATION COMPANY,

Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Respondent.

BE IT REMEMBERED, that on Tuesday, November 11th, Wednesday, November 12th, and Thursday, November 13th, 1913, pursuant to the stipulation hereunto annexed, at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, duly commissioned to take acknowledgments of bail and affidavits, etc., Wilfred Page, J. B. Levison, Charles R. Page and John A. Bishop, witnesses on behalf of the Respondent, and George F. Thorndyke, a witness on behalf of the Libelant.

H. R. Clise, Esq., appeared as proctor for the Libelant, and Ira A. Campbell, Esq., appeared as proctor for the Respondent, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth. [440]

(It is hereby stipulated and agreed by and be-

tween the proctors for the respective parties, that the depositions of Wilfred Page, J. B. Levison, Charles R. Page and John A. Bishop may be taken on behalf of the Respondent, and that the deposition of George F. Thorndyke may be taken on behalf of the Libelant, at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, on Tuesday, November 11th, Wednesday, November 12th, and Thursday, November 13th, 1913 before Francis Krull, United States Commissioner for the Northern District of California, and in shorthand by Herbert Bennett.

It is further stipulated that the depositions when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.) [441]

[Deposition of Wilfred Page, for Respondent.]

WILFRED PAGE, called for the respondent, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. Wilfred Page.

Q. What is your business, Mr. Page?

A. Average adjuster.

(Deposition of Wilfred Page.)

Q. With whom are you associated as an average adjuster? A. George E. Billings Company.

Q. Who is in charge of the adjusting department of George E. Billings & Company? A. I am.

Q. How long have you been engaged in the business of average adjusting?

A. I have been practicing since 1909.

Q. Had you done any adjusting prior to that time?

A. I had never done any adjusting; I have been connected with the business since about 1901.

Q. Were you ever in the employ of Johnson & Higgins, average adjusters? A. Yes, sir.

Q. Are you familiar with the terms and conditions of the San Francisco form of hull time policy?

A. Yes, sir.

Q. Have you prepared an adjustment of the estimated cost of repairing the damages to the "William Nottingham" suffered by her at the time of her dismasting off the Columbia River in October, 1911, so as to show what the Fireman's Fund Insurance Company would be required to pay under its policies covering on that vessel as of partial loss for labor and materials; that is to say, an adjustment which will show what the Fireman's Fund Insurance Company would be required to pay under its policies as for labor and materials had the policies covered on the "Nottingham" against partial loss?

A. Yes, sir.

Q. Have you prepared a formal adjustment?

A. Yes, sir. [442]

(Deposition of Wilfred Page.)

Q. Have you it with you?

A. Yes, sir, (producing).

Q. I will ask you to go through the adjustment and state what you have put in the same; what is your first item?

Mr. CLISE.—I would like to object to the introduction of this adjustment into evidence understanding at this time it is not offered, or to any of the information contained therein, on the ground that the same is incompetent, irrelevant and immaterial.

Mr. CAMPBELL.—I propose to offer it in evidence at the close of this examination.

Mr. CLISE.—It is stipulated between the parties that my objection applies to the entire examination of this witness relative to this adjustment and anything contained therein.

A. The first item is the charge of the Port of Portland for drydocking the vessel on December 21st. This charge is \$79.34, and in accordance with the terms of the policy was charged to the dockage account.

Mr. CAMPBELL.—Q. I want to go through first and get the various items and then we will go back over the analysis. From where did you obtain the dockage charge of \$79.34?

A. From Johnson & Higgins' adjustment of the general average.

Q. Can you refer to the page of the Johnson & Higgins adjustment and show that to me?

A. The first and second item.

(Deposition of Wilfred Page.)

Q. That is the item contained on the fourth page of the Johnson & Higgins adjustment, dated San Francisco, April 30, 1913? A. Yes, sir.

Q. What is your next item which you have put in your adjustment? [443]

A. The bid of the Albina Engine and Machine Works for the repairs as per specifications \$20,950.00.

Q. Was the bid in accordance with the specifications? A. Yes, sir.

Q. What was the total amount of their bid?

A. \$20,950.00.

Q. What is the next item which you have in the adjustment?

A. A credit for certain changes in the specifications which were agreed upon between Captain Gibbs and Mr. Walker.

Q. What was the date of that agreement?

A. March 27th, 1912.

Q. What was the total amount of the credits allowed as per the Gibbs and Walker agreement?

A. \$735.00.

Q. What is the figure allowed for salting vessel?

A. \$600.00.

Q. What is the next item in the adjustment?

A. Allowance for the cost of caulking the stanchions including the removal and replacing of the wash strake.

Q. What amount is that? A. \$277.50.

Q. From where was that obtained?

A. That was obtained from Hall Brothers bid for

(Deposition of Wilfred Page.)

doing the work.

Q. Marked Exhibit 5-A?

A. It is marked Exhibit 8, I believe.

Q. What is the Exhibit 5-A you refer to?

A. That is the agreement between Walker and Gibbs in regard to credit and also this allowance of caulking the stanchions.

Q. What is the next item in the adjustment?

A. That is all.

Q. Have you in your adjustment made a segregation of these various items and charged them to various interests in [444] accordance with the terms and conditions of the policies covering on the "Nottingham"? A. Yes, sir.

Q. How have you charged the first item for dockage? A. In the dockage column.

Q. \$79.34? A. Yes, sir.

Q. Have you made any segregation, for adjustment purposes, of the bid of the Albina Engine & Machine Works? A. Yes, sir.

Q. What is your segregation?

A. The first item is "stores, principally of a consumable nature \$1,500.00."

Q. Where have you charged those?

A. That item is charged to particular average net.

Q. What do you mean by "particular average net"?

A. Particular average net consists of items which are a claim upon underwriters without deduction provided they aggregate the required percentage.

Q. What do you mean by that "they aggregate

(Deposition of Wilfred Page.)

the required percentage''?

A. The ordinary provision of a policy is they are free from claim under a certain percentage.

Q. Assuming that this policy was a policy covering against all particular average, then, under those circumstances, what does particular average net mean?

A. It means an item for which the underwriters are liable without deduction.

Q. Without what character of deduction?

A. New for old.

Q. That is the one-third off new for old?

A. Yes, sir.

Q. Where did you secure the figure of the \$1,500.00?

A. From the testimony of Mr. Cornfoot.

Q. Can you refer to the pages of his deposition?

A. 13 and 14.

Q. Of Mr. Cornfoot's deposition? A. Yes, sir.

Q. Where have you charged the \$1,500.00, in what column? [445] A. Particular average net.

Q. What was the next segregation under the Albina Engine & Machine Works' bid?

A. Cabin furniture, fixtures, etc., \$1,000.00.

Q. Where have you charged that?

A. Particular average one-third off.

Q. Where did you secure the figure \$1,000.00?

A. From Mr. Cornfoot's testimony.

Q. On what pages?

A. 13 and 14.

Q. Under what provision of the policy did you

(Deposition of Wilfred Page.)

enter the cabin furniture, fixtures, etc., \$1,000.00 to the one-third off column?

A. The San Francisco policy provides that all claims for repairs shall be—

Mr. CLISE. —(Intg.) I object to the notation from the San Francisco form of policy; if the witness will make a reference to the policy itself that is the only one in controversy in this matter.

Mr. CAMPBELL.—Q. Under what section of the policy do you charge the \$1,000.00 to the one-third off column?

A. My recollection is it is provided—

Q. (Intg.) Examine the policy?

A. Section 8, lines 43 to 49 inclusive.

Q. Provided what?

A. Provided that “It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by the perils insured against (except on Anchors, Copper and calking under the Copper), as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage, and their proceeds deducted from the gross loss. And it is especially agreed that, instead of [446] deducting one-third for new on the expense of re-metaling, including docking and calking, there shall be deducted two and one-half per cent of the cost of remetaling, docking and calking, after deducting the value of the old metal and nails, for each and every month the metal shall have been on the vessel at the time when it is taken off; and if it shall

(Deposition of Wilfred Page.)

have been on forty months or more, the cost shall be wholly borne by the insured. In case the vessel shall be on a single bottom, the same rule shall apply to docking and calking, but one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured."

Q. What is the next segregation of the bid?

A. The item "drydock dues, \$382.00."

Q. From where was that obtained?

A. From Mr. McIntosh's testimony, pages 37 and 38.

Q. Where do you charge that?

A. That is charged in the column marked "dock-age."

Q. What is the next item under segregation of the bid?

A. Painting, bottom, labor and material, \$330.00.

Q. From where did you obtain that?

A. From Mr. McIntosh's testimony, pages 37 and 38.

Q. Where have you charged that?

A. In the column marked "bottom painting."

Q. What is the next item of segregation?

A. Caulking and cementing bottom, \$175.00.

Q. From where did you obtain that?

A. From Mr. McIntosh's testimony, pages 37 and 38.

Q. Where is that charged?

A. Bottom caulking—I should [447] say in the

(Deposition of Wilfred Page.)

column marked "bottom caulking."

Q. What is the next item under the bid?

A. Other repairs; that is to say, the remainder of the bid price, \$17,563.

Q. That is to say, what remains deducting \$1,500.00 for stores; \$1,000.00 for cabin furniture; \$382.00 for drydock dues; \$330.00 for painting bottom; \$175.00 for caulking and cementing bottom?

A. Yes, sir.

Q. Where did you charge the item of \$17,563.00?

A. Particular average one-third off.

Q. Under what provisions of the policy do you enter that item in the one-third off column?

A. Under Section 8, just quoted.

Q. What are the credits which you next show in the adjustment?

A. They are items in an agreement signed by Captain Gibbs and Mr. Walker, dated March 27th, 1912.

Q. What is the first item?

A. The first item relates to the mast steps.

Q. What was the price agreed upon?

A. \$30.00.

Q. What is the next item?

A. Overhauling the forerigging, \$75.00.

Q. The next item?

A. Painting the decks, \$25.00.

Q. The next item?

A. Copper paint for bottom, \$80.00.

Q. The next item?

A. Foresail, foretopsail and forestay sail, \$475.00.

Q. The next item?

(Deposition of Wilfred Page.)

A. Stanchions and iron chock, \$50.00.

Q. What is the sum total of those credits?

A. \$735.00.

Q. Where do you enter those credits?

A. Those credits are entered in the particular average one-third off column with the exception of copper paint for the bottom.

Q. Where is that entered?

A. It is entered—this copper [448] paint for the bottom is credited to the bottom painting column.

Q. Why do you enter all of the credits save the one for painting in the one-third off column?

A. Because they are modifications of the tender for repairs which has been charged to the particular average one-third off column in accordance with Section 8.

Q. That is to say, they were repairs which, if they had been necessary, would have been charged in the one-third off column?

A. They are repairs which are already included in this column of the item, \$17,563.00.

Q. What is your next item?

A. Salting the vessel, \$600.00.

Q. Where is that charged?

A. Particular average one-third off.

Q. Under what provision of the policy was that charge made in that column? A. Section 8.

Q. What is your next item?

A. Caulking the stanchions including removing and replacing the wash strake, \$277.50.

Q. Where is that charged?

(Deposition of Wilfred Page.)

A. Particular average one-third off.

Q. Under what provision of the policy is that charge in that column? A. Section 8.

Q. What is the next item? A. That is all.

Q. Now, referring back to the first entries in the adjustment of \$79.34 for dockage dues and \$382.00 for dockage dues, I will ask you if you have made any apportionment of that charge for dockage over other items of repair? A. Yes, sir.

Q. How have you made that segregation?

A. That item has been apportioned in accordance with the policy conditions under the rules for adjustment of losses, rule two. [449]

Q. Whereabouts on the policy do those rules appear? A. On the back of the policy.

Q. What section of rule two? A. Section two.

Q. Just read the provision, if you will, please?

A. "When a vessel is docked, or hove out for the twofold purpose of remetaling, (or, if on a single bottom, recalking) and repairing keel or bottom, by reason of having collided, or stranded, then the expense of docking or heaving out shall be proportioned *pro rata* upon coppering and (or) calking and other repairs, in the proportion of the number of days' work expended upon each respectively. The above rules shall also apply to wharfage, but no wharfage shall be allowed for, except when indispensably necessary to the repairing of the vessel."

Q. How have you made the apportionment of the dockage dues?

A. The number of days' work for each class of re-

(Deposition of Wilfred Page.)

pairs was testified to by Mr. McIntosh, as follows—

Q. (Intg.) On what pages of his deposition?

A. 37 to 39. Bottom painting 30 days; bottom caulking and cementing 35 days; bottom work other than the other two items 25 days.

Q. What was the total number of days required for doing the painting, caulking and other bottom work as testified to by Mr. McIntosh? A. 90 days.

Q. What have you done with the total cost of docking, to wit, \$461.34 being the total of \$79.34 and \$382.00, using the total number of day's work to do the specified work as testified to by Mr. McIntosh?

A. The 30/90ths of the dockage is charged to bottom painting.

Q. 30/90ths of \$461.34? A. Yes, sir.

Q. How much would that be?

A. \$153.78. [450]

Q. And where is that charged?

A. Bottom painting.

Q. That appears on pages 5 and 6 of the adjustment? A. Yes.

Q. What was the next apportionment made?

A. 35/90ths of the cost of dockage, namely \$461.34 is charged to bottom caulking and cementing.

Q. How much does that amount to?

A. 179.41

Q. And the next item?

A. 25/90ths of the cost of dockage is charged to particular average one-third off.

Q. Amounting to how much? A. \$128.15.

Q. I will ask you whether or not you now have

(Deposition of Wilfred Page.)

transferred the docking charge of \$461.34 appearing on page 6 of the adjustment to the three columns marked "bottom caulking, bottom painting and particular average one-third off"? A. Yes, sir.

Q. Does that eliminate from further consideration the dockage column in the adjustment?

A. Yes, sir.

Q. What has been your next step in the making up of the adjustment?

A. The columns headed "bottom caulking, bottom painting and particular average one-third off,"—

Q. On page 6?

A. (Contg.) —are footed and the totals brought down on page 6.

Q. What is the total of the bottom caulking column? A. 354.41.

Q. That is made up of the original item of \$175.00 appearing on pages 1 and 2 for caulking and cementing bottom, on page 2, of the bottom caulking column and \$179.41 bottom caulking apportionment of the dockage dues? A. Yes, sir.

Q. What is the total of the bottom painting column? A. 403.78.

Q. And is that likewise made up of the item of \$330.00 for [451] painting bottom, labor and material appearing on pages 1 and 2 of the adjustment and on page 4 of the adjustment, after deducting the credit of \$80.00 allowed as per the Gibbs and Walker agreement of March 27th, and the additional figure of \$153.78, being the painting proportion of the dry-dock dues? A. Yes, sir.

(Deposition of Wilfred Page.)

Q. What is the next footing that you have made?

A. The totaling of the particular average one-third column.

Q. What is the total of that column?

A. \$18,913.65.

Q. Appearing on page 6 of the adjustment?

A. Yes, sir.

Q. Is that column made up of the \$18,563.00 appearing as the footing of the particular average one-third off column on page 2, less the credits in that column on page 4, plus the cost of salting and caulking stanchions and removing and replacing wash strake appearing in the one-third off column on page 4, plus the \$128.15 dockage dues charged to the one-third off column appearing on page 6?

A. Yes, sir.

Q. Now, under the policies covering on the "Nottingham" is any proportion of the \$354.41 of the footing of the bottom caulking column on page 6 chargeable to the insurance company?

A. No, sir.

Q. Why not, and if not charged under what provisions do you not make the charge against the insurance company?

A. Section 8 of the policy provides that the cost of recaulking shall be charged to the owners at the rate of two and one-half per cent for each month since the vessel was previously caulked, or if it was over 40 months the entire cost shall be borne by the insured. In Mr. Thorndyke's testimony, page 81, it is stated that the vessel was previously [452]

(Deposition of Wilfred Page.)

caulked in April, 1907, which is over 40 months prior to the date of this accident. Therefore, the entire item is charged to the owners.

Q. That appears charged to the owners as \$354.41 in the owner's column, page 6? A. Yes, sir.

Q. To whom have you charged the bottom painting of \$403.78?

A. Partly to the owners and partly to the underwriters.

Q. Under what provision of the policy has that segregation been made?

A. Section 8 provides that where a vessel is on a single bottom one-twelfth is to be deducted from the cost of painting for each month since the vessel was previously painted and if she has not been painted for 12 months the whole cost to be charged to the insured. It appears from Mr. Thorndyke's testimony, page 81, that the vessel was previously painted in April, 1911, which would be six months prior to this accident. Therefore, one-half is charged to the underwriters and one-half to the owners; six-twelfths to each.

Q. Does that segregation appear at \$201.89 in both the particular average net column and the owners column on page 6? A. Yes, sir.

Q. What are the figures \$6,304.55 appearing in the particular average one-third off column on page 6 and how are they obtained?

A. It is one-third of the cost of the repairs in accordance with Section 8 of the policy.

Q. That is to say, it is one-third of \$18,913.65?

(Deposition of Wilfred Page.)

A. Yes, sir.

Q. Is that the one-third deduction which is made new for old? A. Yes, sir.

Q. Under clause 8 of the policy?

A. Yes, sir. [453]

Q. What is the balance of the \$18,913.65 after deducting the one-third? A. 12,609.10.

Q. Where have you entered that?

A. In the particular average net column.

Q. Now, on page 6 what is the particular average net column made up of?

A. It is made up of \$1,500.00 brought forward from page 2.

Q. Being the stores that are charged net?

A. Being the stores which are charged net; \$201.89 being one-half the painting; \$12,609.10 being the particular average after deducting one-third new for old.

Q. Now, if the "Nottingham" had been insured under these policies against a partial loss or particular average and had been so damaged as to have required the repairs which are set forth in the adjustment, what would have been the amount that the insurance company would have been required to pay under this policy, under an adjustment as of partial loss for labor and materials provided that there had been a full insurance upon the vessel?

A. \$14,310.99.

Q. Now, Mr. Page, the policies covering on the "Nottingham" insured by the Globe Navigation Company in the sum of \$30,000 on a valuation of

(Deposition of Wilfred Page.)

\$45,000. Assuming that those policies had covered against a partial loss and the vessel had suffered the damages set forth in the adjustment, what would have been the amount which the insurance company would have been required to pay under the adjustment as of a partial loss for labor and materials?

A. 30/45ths of that sum.

Q. Will you calculate it out on the adjustment so that you will have the figures there. Just put it in ink? A. \$9,540.66. [454]

Q. Would that equal 50 per cent of the amount for which the vessel was insured? A. No, sir.

Q. Now, I will ask you whether or not that adjustment has been made up in accordance with the settled practice of making adjustments as for partial loss for labor and materials under policies of the kind covering on the "Nottingham" in this case?

Mr. CLISE.—Do I understand that you are asking now as to the particular policy in controversy in this case?

Mr. CAMPBELL.—Yes.

Mr. CLISE.—Then, I object for the additional reason that it is calling for the conclusion of the witness and is not competent.

A. Yes, sir.

Mr. CAMPBELL.—Q. What do you mean by it being on a single bottom referred to in the clause of the policy?

A. It means a vessel that has not a copper sheathing in addition to the regular planking.

Mr. CAMPBELL.—I suppose it will be admitted

(Deposition of Wilfred Page.)

in this case that she was not a copper-bottomed vessel?

Mr. CLISE.—Yes.

Mr. CAMPBELL.—I will offer the adjustment in evidence and ask that it be marked Respondent's Page Exhibit No. 1.

Mr. CLISE.—The same objection.

(The adjustment is marked Respondent's Page Exhibit No. 1.)

Mr. CAMPBELL.—Q. In making up your adjustment did you have before you the testimony taken in the case including Mr. Thorndyke's deposition and the depositions of Mr. Cornfoot and Mr. McIntosh? A. Yes, sir.

Q. Did you also have before you a copy of the specifications [455] on which Mr. Cornfoot made his bid? A. Yes, sir.

Q. I hand you a document and ask you if that is a copy of the specifications which you used?

A. Yes, sir.

Mr. CAMPBELL.—I will offer it in evidence and ask that it be marked Respondent's Page Exhibit No. 2.

(The document is marked Respondent's Page Exhibit No. 2.)

Cross-examination.

Mr. CLISE.—Q. Mr. Page, referring to this first item, "dockage," why do you deduct 50 per cent?

A. We do not deduct that; that is the Port of Portland charge.

Q. The Port of Portland charge was \$74.35?

(Deposition of Wilfred Page.)

A. According to Johnson & Higgins adjustment.

Q. Now, I notice in the analysis of the bid of the Albina Engine and Machine Works that you carry stores in the net column under the particular average without deducting the one-third new for old?

A. Yes, sir.

Q. Is there not any other item contained in the repairs that would not be subject to the deduction of one-third new for old?

A. As I understand the testimony of Mr. Cornfoot, the item for stores, \$1,500.00, and the item for cabin furniture and fixtures, \$1,000.00, were the only two items which could in any way be separated as movable or anything that would not come under the heading of repairs to vessels provided in the clause of Section 8.

Q. Did you examine the report of survey and specifications as prepared by Mr. Walker and an exhibit in this case?

A. I read the specifications for repairs, yes, sir.

Q. Now, Mr. Cornfoot's testimony, as I remember it, was for the movable stores such as provisions and things of that kind, are included in the \$1,500.00 and the \$1,000.00 was [456] *was* for cabin equipment, was it not?

A. Yes, sir, that is my recollection.

Q. Taking the item of navigation instruments that is contained in this report of Mr. Walker, would that be subject to a deduction of one-third new for old?

A. Yes, sir.

Q. Were there any anchor chains or other metal

(Deposition of Wilfred Page.)

articles that were contained in these specifications?

A. Not that I recollect.

Q. All metal articles would not be subject to the deduction, would they?

A. All metal articles, yes, with one exception, I think, the anchors.

Q. But everything else would be subject to the deduction of one-third new for old?

A. In accordance with Section 8 which I have read.

Q. Are there any spars or extra part of ship's tackle provided for in these specifications?

A. I do not recollect any extra parts, no.

Q. If there are you have deducted one-third new for old?

A. If they are included in the bid other than that one item.

Q. Have you examined to know whether there was new rope sails or other parts of the rigging and equipment which had not been used and were to replace the same; was there anything of that kind contained in these specifications?

A. As I understand Mr. Cornfoot's testimony, those are all included in those first two items of \$2500.00.

Q. What did you understand Mr. Cornfoot's testimony included in the item of \$1500.00?

A. Principally stores, or what we might call provisions, but there was also certain chandlery stores he names, if I recollect it, hose and fittings of that kind. [457]

(Deposition of Wilfred Page.)

Q. But you do not include in that \$1500.00 any of the items contained in these specifications other than what are included under subsistence stores, chandlery stores and slop chest; do you include anything other than that or do you include slop chest?

A. As I understand Mr. Cornfoot's testimony the \$1500.00 includes all of those stores.

Q. That is subsistence stores and chandlery stores? A. Yes, sir.

Q. That is all?

A. Of course, there is some of those stores, for instance, the hose which he says specifically should properly be one-third off.

Q. Well, in making this adjustment I understand that you took this report of the survey of Mr. Walker in connection with Mr. Cornfoot's and Mr. McIntosh's testimony to make up this adjustment, did you not?

A. I took the specifications for repairs. I do not think I have seen Mr. Walker's survey.

Q. You have not seen that?

A. I had the specifications under which the tender was made.

Q. But you have not seen Mr. Walker's survey?

A. No, sir.

Q. So, that if Mr. Walker's report or survey would in any way modify Mr. Cornfoot's testimony, would your adjustment be incorrect then in that particular?

A. I think not. As I understand it, the specifications were drawn for the repairs and the tender was

(Deposition of Wilfred Page.)

taken on that basis. I have complied with the specifications and that tender, but that is all that would come in it.

Q. What do you mean by the specifications? Was not Mr. Walker's survey and specifications made a part of the call for the bids?

A. I could not say; according to the testimony which I saw, the specifications for the repairs were put in [458] as Exhibit "F," Libellant's Exhibit "F."

Q. If the Walker survey and specifications call for the taking out, straightening or replacing of any iron or steel parts, you deducted the one-third new for old as against all such items, did you? A. Yes, sir.

Q. If the vessel had the hull or machinery or tackle damaged and the repairs consisted in removing or replacing and otherwise repairing the damaged parts and not replacing them, you deducted the one-third new for old against all such items?

A. Yes, sir, with the exception noted.

Q. You deducted one-third new for old as against everything, save and except the one single item of \$1500.00? A. Yes, sir.

Q. You have not taken the salvage charges into consideration at all in making up this adjustment?

A. No, sir.

Q. Or the expenses incident to it? A. No, sir.

[Deposition of J. B. Levison, for Respondent.]

J. B. LEVISON, called for the respondent, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. J. B. Levison.

(Deposition of J. B. Levison.)

Q. What business are you in?

A. Underwriting.

Q. Do you hold any official connection with the Firemen's Fund Insurance Company?

A. Second Vice-president of the Firemen's Fund Insurance Company.

Q. Are you in charge of any particular department of that company's business?

A. Yes, sir, the marine department.

Q. That was the department in which the policies on the "William Nottingham," in suit, were issued?

A. Yes, sir.

Q. How long have you been engaged in the marine insurance business? A. 35 years. [459]

Q. How long have you been at the head of the marine department of the Firemen's Fund Insurance Company? A. 23 years.

Q. Are you familiar with the policies which were issued on the "William Nottingham"? A. I am.

Q. What, in the parlance of marine insurance business on the Pacific Coast, is that character of policy called. A. Total loss and general average policy.

Q. What I am getting at is this: Is it called a hull time policy?

A. Oh, I did not understand the question. Yes, a hull time policy.

Q. What form of a hull time policy?

A. What is generally known as a total loss policy.

Q. Is it generally known by any name indicative of the place in which it originated?

A. The policy itself?

(Deposition of J. B. Levison.)

Q. Yes, the type of policy?

A. It is generally called "The San Francisco hull type of policy."

Q. How long has that form of policy, save for any marginal clauses, been in use on the Pacific Coast?

A. My impression is that the policy was in use when I came in the business. Of course, I would not want to say that definitely, because I do not remember how long it has been under way.

Q. Has that form of policy been used in insuring wooden sailing vessels of the type of the "William Nottingham"? A. It has.

Q. How generally used?

A. You are speaking now of the San Francisco hull time policy?

Q. Yes. A. Universally.

Q. Are you familiar with the marginal clause appearing on the "Nottingham" policies?

A. Yes, sir, I am.

Q. How long has that clause been used by your company, if [460] at all, on policies covering on vessels of the type of the "Nottingham"?

A. A number of years, I do not know. I could not say just how long, but for quite a number of years.

Q. What character of loss are the policies issuing on the "Nottingham," in suit, intended to cover?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial and calling for the conclusion of the witness. The instrument will speak for itself.

A. They are intended to cover against total and/or constructive total loss of the vessel and also general

(Deposition of J. B. Levison.)

average, salvage charges, and in addition to that claims under the three-fourths running down clause.

Mr. CAMPBELL.—Q. That is to say, actual and/or constructive total loss, and general average, salvage charges and claims under the three-fourths running down clause? A. Yes, sir.

Q. What character of claims come under the three-fourths running down clause?

A. Claims against the owner of a vessel for damages done to another vessel for which he may be held liable.

Q. I call your attention to the clause in the body of the policy, which has been deleted, reading: “Unless amounting to at least” (blank) “per cent net,” and ask you why that deletion was made?

Mr. CLISE.—Objected to as incompetent and immaterial.

A. That is made to emphasize the fact that we do not insure the risk of particular average.

Mr. CAMPBELL.—Q. If that clause had not been deleted, would or would not the policy have covered against particular loss and particular average?

Mr. CLISE.—The same objection. [461]

A. That clause is deleted in order, as I said before, to emphasize that fact; if the words were not struck out and the blank space before “per cent net” left, it would leave it uncertain. ..

Mr. CAMPBELL.—Q. In insuring vessels of the type of the “Nottingham,” what is your customary per cent of average which is inserted in the blank ap-

(Deposition of J. B. Levison.)

pearing in that clause?

Mr. CLISE.—The same objection.

A. 5 per cent.

Mr. CAMPBELL.—Q. If the figures “5 per cent” had appeared in the blank in that clause, would or would not the policy have covered against partial loss amounting to 5 per cent or more?

Mr. CLISE.—The same objection.

A. You mean with this marginal clause as it stands?

Mr. CAMPBELL.—Q. We are not discussing the marginal clause; leaving the marginal clause out of the question? A. It would.

Q. Disregarding any marginal clause on the policy, I ask you whether or not, if there had been the figure 5 per cent inserted in the blank in the clause now deleted reading “unless amounting to at least” (blank) “per cent net,” would the policy then have covered against a partial loss amounting to 5 per cent or more?

Mr. CLISE.—The same objection.

A. It would.

Mr. CAMPBELL.—Q. Under what provision, if any, in the printed body of the policy is the insurance against general average provided for?

A. There is no provision of the policy specifically mentioning the risk of general average. [462]

Q. On the policies as written on the “Nottingham,” wherein does the insurance against general average appear? A. In the margin.

Q. Wherein, in the body of the policy, does the pro-

(Deposition of J. B. Levison.)

vision appear covering salvage charges?

A. It does not appear.

Q. Wherein, on the policies covering on the "Nottingham," does the insurance against salvage charges appear? A. On the marginal note.

Q. I will ask you whether or not in issuing these policies on the "William Nottingham," it was the intention of the Firemen's Fund Insurance Company by the endorsement of the marginal clause reading: "This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths running down clause" to nullify, override or modify the printed conditions of the policy under which abandonment could be made as for a constructive total loss?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial and calling for the conclusion of the witness. The instrument speaks for itself.

A. It was not.

Mr. CAMPBELL.—Q. Where you are insuring vessels of the type of the "Nottingham" against actual and/or constructive total loss, and general average, salvage charges and claims under the three-fourths running down clause, what character of policies does your company issue?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial as to what they may have issued in other cases. A. Similar policies to this.

Mr. CAMPBELL.—Q. Mr. Levison, in your experience as a [463] marine underwriter, have you

(Deposition of J. B. Levison.)

ever known of any policy which provided for the adding of claims under the three-fourths running down clause to the cost of repairs to a damaged vessel for the purpose of constituting a constructive total loss?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial. A. I have not.

Mr. CAMPBELL.—Q. In all your experience as a marine underwriter, have you ever known of a case where claims under a three-fourths running down clause were added to the physical damages to a vessel or cost of the repairs to make a constructive total loss under a policy covering on that vessel?

Mr. CLISE.—The same objection.

A. I have not.

Mr. CAMPBELL.—Q. What was the purpose of the Fireman's Fund Insurance Company in endorsing the marginal clause on the "Nottingham" policies to which I have referred?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial. The instrument speaks for itself.

A. I should say that was done to indicate the character of insurance that the owners of the "William Nottingham" and the Fireman's Fund Insurance Company had agreed to.

Mr. CAMPBELL.—Q. I will ask you whether or not the marginal clause to which I have referred, adds any indemnity to the policy than is otherwise provided in the policy?

Mr. CLISE.—The same objection.

(Deposition of J. B. Levison.)

A. It does not.

Mr. CAMPBELL.—Q. I call your attention to the valuation of \$45,000.00 in the policy and ask you whether or not that necessarily is the figure of the actual market value of the [464] “Nottingham”?

Mr. CLISE.—The same objection.

A. It is not.

Mr. CAMPBELL.—Q. Are the valuations on wooden vessels placed in the insurance policies generally commensurate with the market values of the vessels?

Mr. CLISE.—The same objection.

A. No, sir.

Mr. CAMPBELL.—Q. How do they correspond generally with the market values of wooden vessels?

Mr. CLISE.—The same objection.

A. The valuation in the policy as a rule has no relation whatever to the market value of the vessel.

Mr. CAMPBELL.—Q. How do the valuations generally compare; which is the higher in the case of vessels of the type of the “Nottingham”?

Mr. CLISE.—The same objection.

A. The valuation for insurance purposes as a rule exceeds the actual value of the vessel.

Mr. CAMPBELL.—Q. What is the purpose of insurance companies in placing higher valuations in policies than the actual market value?

Mr. CLISE.—The same objection.

A. I should say that it is the method of indicating the manner of arriving at the settlement of a claim

(Deposition of J. B. Levison.)

as much as anything else; particular average claim, I mean.

Mr. CAMPBELL.—Q. Was there any difference made at the time the “Nottingham” policies were issued between the rates on policies covering against partial loss and policies covering against actual and /or constructive total loss, and general [465] average, salvage charges and claims under the three-fourths running down clause?

Mr. CLISE.—The same objection.

A. There was.

Mr. CAMPBELL.—Q. What was the going rate at that time for policies covering against partial loss with a 5 per cent average?

Mr. CLISE.—The same objection.

A. The minimum rate for vessels of the type of the “Nottingham” was 6 per cent for what we call the full policy.

Mr. CAMPBELL.—Q. What do you mean by a full policy?

A. That is a policy covering 5 per cent particular average and total loss, general average, salvage charges and the three-fourths running down clause.

Q. What was the reduction rate made for the deletion partial loss liability?

Mr. CLISE.—The same objection.

A. 1 per cent.

Cross-examination.

Mr. CLISE.—Q. If the words “unless amounting to at least” (blank) “per cent net” in the first clause had not been stricken out and the marginal clause

(Deposition of J. B. Levison.)

not inserted, then the policy would have covered particular average?

A. The policy would never have been written that way.

Q. If you had inserted, say, 5 per cent in that blank, then it would have covered particular average?

A. If we had inserted 5 per cent in that blank then it would have covered particular average.

Q. If the words 5 per cent had been inserted in the blank in the first paragraph and the marginal clause been added [466] what addition would be made in the policy?

A. The marginal clause never would have been added, because if we had 5 per cent average policy, then there would have been no occasion to put that clause in.

Q. Would the omission of these words and the addition of the marginal clause—that added then an additional liability to the company, did it not?

A. No, sir.

Q. Was the liability of the company wholly governed by the marginal clause?

A. No, sir, I should say that that marginal clause was inserted to emphasize the character of insurance when taken in conjunction with the deletion of these words we have referred to.

Redirect Examination.

Mr. CAMPBELL.—Q. Mr. Levison, do you remember Mr. Clise's and Mr. Thorndyke's visit here in February, 1912, after the settlement of the salvage

(Deposition of J. B. Levison.)

claim by the Port of Portland? A. I do.

Q. Was that visit made here at your request?

A. I do not recall the circumstances surrounding that visit. I should say I did not ask Mr. Clise or Mr. Thorndyke to come to San Francisco, if that is what you mean.

Q. Have you any recollection of having asked them to come to San Francisco? A. I have not.

Recross-examination.

Mr. CLISE.—Q. Your answer to this last question was confined to yourself personally, I suppose?

A. That would apply to either myself, or the company.

Q. Would it apply to yourself personally, or would it apply to every one in the employ of the company?

A. I should say that Mr. Clise and Mr. Thorndyke would not have been asked to [467] come to San Francisco by any employee without my knowledge.

Mr. CAMPBELL.—Q. Would any one in your company have authority to invite Mr. Clise or Mr. Thorndyke to come to San Francisco without your authorization? A. No, sir.

Mr. CLISE.—Q. Sometimes cannot people in your employ do things without authority?

A. That can be said in every business, but in this case, it was such an important matter and I was in touch with it, so I do not think any one in our office would ask Mr. Clise or Mr. Thorndyke to come to San Francisco without my authority.

[Deposition of Charles R. Page, for Respondent.]

CHARLES R. PAGE, called for the respondent, sworn.

Mr. CAMPBELL.—Q. You are the same Mr. Page who testified in this case at Seattle?

A. Yes, sir.

Q. Will you state whether or not E. M. Cherry at Astoria, Oregon, is or was at the time the “Nottingham” sailed out of the Columbia River on the voyage on which she was damaged, an agent of the Fireman’s Fund Insurance Company?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial.

A. He is not now and never has been.

Mr. CAMPBELL.—Q. Do you know what his initials are?

A. E. M. Cherry, if I am not mistaken.

Q. Was his father dead prior to the “Nottingham” disaster?

A. Yes, sir, to the best of my knowledge.

Q. Did the Fireman’s Fund Insurance Company ever pay the Globe Navigation Company or its agent the Fireman Fund’s proportion of the general average charge against the “Nottingham” as stated in the general average adjustment prepared by [468] Johnson & Higgins? A. They have, yes.

Q. Can you refer to your records and tell me what amount of the general average on the vessel the insurance company paid to Johnson & Higgins?

A. I can, yes.

Q. To whom was the money paid?

(Deposition of Charles R. Page.)

A. Will you let me explain that in my own way?

Q. Yes.

A. On the 7th of February, 1912, there was paid to the Secretary of the Board of Marine Underwriters of San Francisco \$2,000.00 for the purpose of and subject to the conditions of an agreement dated February the 7th, 1912, and signed by Johnson & Higgins' agents by telegraphic authority dated February the 7th, 1912, for the Globe Navigation Company, it being understood that that \$2,000.00 was to be sent to Mr. Thorndyke, I believe it was, who was then in Portland for the purpose of settling the amount agreed upon with the Port of Portland. That is \$2,000.00 of the amount which the Fireman's Fund has paid. The Fireman's Fund has since paid—I have not either the voucher or the date of the payment before me, but I know it to be a fact that we have paid to Johnson & Higgins \$1549.09 representing the balance due to the Globe Navigation Company in respect of the total amount shown to be due as per Johnson & Higgins adjustment.

Q. The total amount of what?

A. The total amount of general average and salvage charges.

Q. The total amount charged against whom?

A. Fireman's Fund Insurance Company on account of its two policies.

Q. On account of what?

A. On account of two policies aggregating \$30,000.00 out of a total of \$45,000.00, insured valuation; in other words, two-thirds.

(Deposition of Charles R. Page.)

Q. On the hull of the vessel?

A. On the hull of the [469] "William Nottingham."

Q. Under what clause of the policies covering on the "Nottingham" was that payment made?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial and calling for the conclusion of the witness; the policy speaks for itself.

A. Under the marginal clause.

Q. Any other clauses in the policy?

A. The general wording of the policy. If I may refer to the policy I can quote that wording. It occurs in Section 3, and is as follows: "And all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which Insurers are liable by the Rules and Customs of Insurance in San Francisco, including the Rules for Adjustment of losses printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this Policy."

Q. Mr. Clise testified in Seattle that the Fireman's Fund Insurance Company had paid five-sixths of the expenditures incident to the salvage suit? Was that correct?

A. I do not understand that we have.

Q. Are you familiar with the adjustment made up by Johnson & Higgins? A. Yes, sir.

Q. Were all of the expenses and salvage charges which would constitute claims against the Fireman's Fund Insurance Company under its policies

(Deposition of Charles R. Page.)

included in the general average statement prepared by Johnson & Higgins?

A. I believe they were, yes.

Q. After the settlement of the salvage claim of the Port of Portland what, if any, dispute remained between the Fireman's [470] Fund Insurance Company and the Globe Navigation Company?

A. Dispute as to whether or not we were liable for a total loss under these policies in suit.

Q. Any other dispute?

A. Not to my knowledge.

Q. Did you ever request Mr. Clise and Mr. Thorndyke to come to San Francisco in February of 1912? A. I believe not.

Q. Have you any recollection?

A. I have no recollection of it.

Q. Have you any recollection of ever being directed by any officer or employee of the Fireman's Fund Insurance Company to made such request?

A. I have not.

Q. I call your attention to the marginal clause on the policies covering on the "Nottingham": "This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths running down clause," and ask you whether or not that clause was intended to nullify, override or modify any of the conditions of the policy under which abandonment could be made as for a constructive total loss?

Mr. CLISE.—Objected to as incompetent, irrele-

(Deposition of Charles R. Page.)

vant and immaterial and calling for the conclusion of the witness. The policy speaks for itself.

A. Most certainly not.

Mr. CAMPBELL.—Q. What was the purpose of inserting the marginal clause just referred to on the policy?

Mr. CLISE.—The same objection.

A. To briefly describe the character of the insurance and to put the assured on his notice that the policy was one against actual and/or constructive total loss, against [471] the risk of general average and/or salvage charges and against the risk of claims which are generally covered under the clause known as the running down clause.

Mr. CAMPBELL.—Q. What was the purpose in deleting the clause on the policy reading: “Unless amounting to at least” (blank) “per cent net”?

Mr. CLISE.—The same objection.

A. To make the policy free of particular average.

Mr. CAMPBELL.—Q. Now, Mr. Page, have you ever known of a policy which provided for the adding of claims under a three-fourths running down clause, to the physical damages to a vessel, or cost of repairs, for the purpose of making a constructive total loss under a hull policy?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial.

A. I have not.

Mr. CAMPBELL.—Q. Have you ever known of a case where claims under a three-fourths running down clause were added to the physical damages to a

(Deposition of Charles R. Page.)

vessel or the cost of repairing some physical damages to make a constructive total loss under a hull policy?

Mr. CLISE.—The same objection.

A. I have not.

(An adjournment is here taken until to-morrow, Wednesday, November 12th, 1913, at 10 o'clock A. M.) [472]

Wednesday, November 12th, 1913.

CHARLES R. PAGE, direct examination resumed.

Mr. CAMPBELL.—Q. Are you familiar with the specifications on which the bid of the Albina Engine & Machine Works was made?

A. Yes, sir, I have been over them several times.

Q. Have you gone over the adjustment that was prepared by Mr. Wilfred Page showing an adjustment as a partial loss for labor and materials based upon the items contained in the adjustment?

A. I have, yes.

Q. Are you or are you not familiar with the settled practice of adjustments as for labor and materials on the Pacific Coast under policies of the character of those covering on the "William Nottingham"? A. I am.

Q. Will you state whether or not the adjustment prepared by Mr. Wilfred Page as of partial loss for labor and materials of the items contained in the adjustment is correct, or not?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial, the witness not showing him-

(Deposition of Charles R. Page.)

self qualified to answer.

A. It is.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. CLISE.—Q. Mr. Page, you do not intend to say that the adjusters have included in the adjustment—I am referring to the one made by Johnson & Higgins, includes anything except based upon information furnished to them by one of the interested parties? A. I do not.

Q. All adjusters do is to make up an adjustment upon information [473] furnished by one or the other of the parties? A. I believe so.

Q. They have no personal knowledge as to the matters that may be in controversy between the insurance company and the owners or any of the parties and the insured?

A. I believe they make it a settled practice to inquire into the facts as to whether or not they have all vouchers before them, all information before them.

Q. If, for any reason, this information has not been given them, why then that charge is omitted, is it not?

A. Yes, sir, if they could not have obtained it.

Mr. CLISE.—I think that is all.

[Deposition of John A. Bishop, for Respondent.]

JOHN A. BISHOP, called for the respondent, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. John A. Bishop.

(Deposition of John A. Bishop.)

Q. What is your business?

A. Average adjuster.

Q. Have you any connection with the firm of Johnson & Higgins, average adjusters?

A. Yes, sir.

Q. What is your connection with them?

A. Manager of the adjusting department.

Q. Did you make up a general average adjustment on the "William Nottingham" arising out of the disaster to that vessel when she was dismasted off the Columbia River on or about the 9th day of October, 1911? A. Yes, sir, we did.

Q. Did you have personal charge of the making up of that adjustment? A. I did.

Q. By whom were you appointed to make up the adjustment?

A. By the owners of the vessel, the Globe Navigation Company.

Q. Are you or are you not familiar with the settled practice [474] of adjustments, both particular and general average on the Pacific Coast?

A. I am.

Q. How long have you been engaged in the business on this coast? A. Since 1902.

Q. Prior to that time, had you had any experience in making up adjustments?

A. Of making up and examining adjustments.

Q. Where? A. In Liverpool.

Q. How many years have you been engaged in the business of an average adjuster?

A. I have been an average adjuster for 11 years;

(Deposition of John A. Bishop.)

ever since I came to this coast.

Q. Have you or have you not, in all your experience in the average adjusting business, ever known of a policy which provided that claims under a three-fourths running down clause might be added to injuries or cost of repairing injuries of an insured vessel so as to make a constructive loss of such?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial and calling for the conclusion of the witness.

A. No, sir, I have not.

Mr. CAMPBELL.—Q. Have you, in all your experience as an average adjuster, ever known of a claim under a three-fourths running down clause having been added to the cost of repairing an injured vessel to make a constructive total loss of such?

Mr. CLISE.—The same objection.

A. No, sir.

Mr. CAMPBELL.—Q. Have you a copy of the general average adjustment which you made up on the "William Nottingham" to which I have previously referred? A. I have our rough office copy.

Q. What do you mean by your rough office copy?
[475]

A. The copy from which the fair copy is made.

Q. That is, you have the original copy of the adjustment prepared by you? A. Yes, sir.

Q. And the other copies which are out are typewritten copies of the original?

A. Of the original, yes, sir.

(Deposition of John A. Bishop.)

Q. Will you state how you acquired the information and obtained the items which you used in making up the adjustment?

A. They were furnished us by the Globe Navigation Company.

Q. You are appearing here under subpoena?

A. I am.

Q. Were you requested to voluntarily appear before service of this subpoena? A. I was.

Q. By me? A. Yes, sir.

Q. Did you refuse to come? A. I declined.

Q. Will you state whether or not you have included in the general average adjustment all of the expenditures connected with the salving of the "William Nottingham" by the tug "Wallula" and her crew, operated by the Port of Portland?

A. So far as I know we have.

Q. Has there been omitted from the adjustment any expenditures incurred by the Globe Navigation Company touching the salvage claims against the "William Nottingham" for the salving of that vessel?

A. No, sir, every bill that we have received has been included in the adjustment.

Q. Was any request of any character made by you upon the Globe Navigation Company for presentation of bills or statements showing the expenditures of moneys which might properly go into the general average adjustment?

A. We had some correspondence, I think, in regard to the bills, but I could not swear as to whether

(Deposition of John A. Bishop.)

we found any omitted for which we asked. [476]

Q. Just describe to the Court what you did in acquiring the necessary information to prepare this adjustment.

A. We followed our usual practice in this case. The bills are furnished us by the owners. We go through the bills and if there is anything which we think has been omitted, we ask for it and ask whether there are any further bills to be included and then when the adjustment is completed we submit it to the owners so they can run through it and see whether there is anything omitted, or not.

Q. Did you or did you not make request upon the Globe Navigation Company for all bills in connection with the disaster which might go into the general average adjustment?

A. My impression is that all the bills were furnished us. I cannot recollect any bills that we asked for specifically, but upon the completion of the adjustment, the rough was sent to the owners for them to run through and see if there was anything omitted.

Q. It was? A. Yes, sir.

Q. To whom did you send the rough adjustment?

A. The Globe Navigation Company.

Q. Where did you send it? A. Seattle.

Q. Do you know the manager of the Globe Navigation Company? A. I do.

Q. What is his name?

A. Mr. Thorndyke.

Q. Did you receive the adjustment back, the

(Deposition of John A. Bishop.)

rough adjustment back from the Globe Navigation Company? A. We did.

Q. Do you know who sent it back to you?

A. No, not without looking up the letter. [477]

Q. Have you a letter in your office?

A. Yes, sir, I believe we have.

Q. Will you send for your files and have them brought up? A. I will if you wish.

Q. State whether or not there was any correction of the adjustment made by the owners.

A. Before answering that I think I would like to see the letter of reply.

Q. Have you the vouchers and bills upon which the adjustment was made up?

A. I think those were returned.

Q. When was the adjustment finally completed by your office? A. April 30th, 1913.

Q. Do you recall whether or not you were in correspondence at all with the Globe Navigation Company from the time of the accident up to the completion of the adjustment respecting the preparation of the general average statement?

A. Yes, sir, we had considerable correspondence at the commencement of the case and then there was a considerable interval, I think, and then there was further correspondence and we closed the case.

Q. Now, I hand you the complaint in this action and call your attention to the items set forth in paragraph 9 and ask you whether or not you examined them? (Handing.) Have you examined the items contained in paragraph 9 of the complaint?

(Deposition of John A. Bishop.)

A. I have.

Q. Will you examine your general average adjustment and state whether or not all of the items set forth in Paragraph 9 of the complaint are included in the general average adjustment?

A. They are all included in it with the exception of this item, \$66.90, and I do not quite know what that is for; it may be in there among a number of [478] items.

Q. Paid the Port of Portland miscellaneous charges, \$66.90?

A. Yes, sir. We have a number of small items here that may make up that amount.

Q. What other items of expense in connection with the salvage have you charged in the adjustment which are not contained in Paragraph 9?

A. Purely in connection with the salvage?

Q. Yes.

A. That is in connection with the statement of the salvage claim, or do you include discharging cargo?

Q. Including the salvage claim now?

A. There are some items here for riding lights at Astoria Harbor and a number of small items, repairs to donkey-boiler; these are items paid to Port of Portland.

Q. How much are the repairs to the donkey-boiler?

A. \$5.10. Launch hire tending "William Nottingham" in Astoria Harbor.

Q. How much is that?

A. \$12.00. And attorneys disbursements and

(Deposition of John A. Bishop.)

telegrams \$11.86. Sundries \$18.14. Bond \$5.00. United States District Court \$4.00, amounts paid to the United States Marshal. Those seem to be all of the expenses in connection with this salvage.

Q. Do you recall whether or not you requested the Globe Navigation Company for all bills incurred in connection with the salvage?

A. I don't remember whether we made an actual demand. I think we were sent them all and then the Globe Navigation Company checked them over, checked over all the bills in the statement to see that they were complete.

Q. What other items of expenditure other than specifically [479] connected with the salvage have you included in the adjustment?

A. Nothing protest, \$5.00. Launch pilot, \$10.00. Frank Walker survey, \$150.00 allowed out of a bill of \$750.00.

Q. How much did you allow in general average?

A. \$150.00. Survey fee for examination on dry-dock, \$10.00. That is in the Port of Portland bills for \$354.15.

Q. I call your attention to an item for \$1245.30, headed Brown & McCabe, stevedores.

A. That is included in this Paragraph 9.

Q. What was that for?

A. In this Paragraph 9 you have got it \$1245.50 and we have it for \$1245.30.

Q. What was that for?

A. That was for discharging cargo and tallying the lumber.

(Deposition of John A. Bishop.)

Q. What is the item designated Port of Portland for dockage, \$99.34?

A. That is a total carried forward.

Q. At the foot of the column under that item, it appears \$99.34. What were those items for?

A. That item includes dockage, \$74.34; labor hauling into dock, \$5.00; and berth at drydock wharf December, 1911, 10 days, \$20.00.

Q. How much of the \$99.34 have you charged to general average? A. \$20.00.

Q. For the berthing of the vessel?

A. For the berth of the vessel, yes.

Q. What is the next item that you have charged to general average?

A. There is \$38.00, which is part of the \$98.00 which is included in this Paragraph 9 of the complaint. \$638.79, that is also included. And \$150.00 which is also included in Paragraph 9.

Q. Referring to the item total \$966.13, appearing as the Port of Portland on page 9, of those expenditures have you charged [480] to general average the cost of towing the "Nottingham" from Astoria to Portland? A. We have, yes, \$150.00.

Q. Where did you charge the storage of lumber?

A. Storage of lumber is charged to general average.

Q. Are there any other items included in the general average adjustment not entered in the Paragraph 9 expenditures?

A. E. A. Strout & Company bond, \$5.00.

(Deposition of John A. Bishop.)

Q. That is covering the vessel while she was being towed?

A. That is in connection with towing the vessel to Portland. \$4.00 United States District Court for advance of railroad fare to the United States Marshal. \$405.29 for the services of the United States Marshal which is included in Paragraph 9 for \$405.31.

Q. Where are those expenses charged?

A. General average. And there is \$15.20 for fares of Mr. H. R. Clise and G. F. Thorndyke from Seattle to Portland, \$15.20.

Q. I see an item for \$56.70 for round trip ticket from Seattle to San Francisco, to whom is that charged? A. To the owner.

Q. Why didn't you charge that in general average?

A. Because we did not think it belonged in general average.

Q. Why not?

A. It was for a round trip from Seattle to San Francisco and return. It was not in connection with the discharge of the cargo or the settlement of the salvage. It was after that time, after that had been settled.

Q. What was the item of \$20.50?

A. That was for the expenses of Mr. Clise to Portland upon presentation of motion to Judge of District Court for removal of schooner "William Nottingham" from Astoria to Portland.

Q. What was the item just above that for \$38.00;

(Deposition of John A. Bishop.)

which was [481] charged to owners; why was not that charged in the general average?

A. My recollection is that the question of general average was not discussed at that time.

Q. What was the item for?

A. It is for expenses to San Francisco upon suggestion of adjusters for conference in regard to the situation the "Nottingham" was then in.

Q. Any other expenses of Mr. Clise?

A. Yes, sir, \$23.10 for expenses on trip to Portland on settlement of libel for the Port of Portland. We have allowed \$250.00 out of a charge of \$500.00 for Mr. Clise's services in re libel of the "William Nottingham."

Q. Why did you not allow the whole \$500.00?

A. In general average the item included one trip to San Francisco and two trips to Portland. We allowed \$250.00 as applying to the expenses, his fee in connection with the libel.

Q. Why didn't you allow the other fee?

A. Because it was not a matter that concerned either the hull underwriters and cargo as general average; merely the protection of the owner's interests.

Q. Under their policies?

A. I am not certain about that now. There were a good many things discussed at that time, and I am not sure about it now. The next item is \$37.50 for Mr. Thorndyke's expenses from Seattle to Astoria in October.

Q. That is charged where?

(Deposition of John A. Bishop.)

A. That is charged to general average. Then there is \$33.20 for Mr. Thorndyke's expenses to Portland, Oregon, and return in October 25th to 27th. That was in connection with the salvage. There is an item of \$72.60 for Mr. Thorndyke's personal expenses for three trips to Portland during November on account of interviews with Port Commission, contracts for towing and discharging [482] "William Nottingham."

Q. Where have you charged that?

A. That is charged to general average.

Q. What is the next item of \$107.00?

A. That is personal expenses of Mr. Thorndyke's trip to San Francisco to consult adjusters and underwriters, November 12th to 18th.

Q. Did you charge that to general average?

A. No, sir, we charged that to the owners.

Q. Why not?

A. Because I do not think that it was a matter in connection with salvage or general average that was discussed at that time.

Q. What is the next item?

A. 27.80, Mr. Thorndyke's expenses for two trips to Portland in December. That is a division of his bill of \$51.40; we allowed \$27.80 to general average and \$23.60 to the owner's column.

Q. What was the basis of that segregation of that apportionment?

A. The trips were in connection with the discharge of the cargo and the salving of the damage to the vessel.

(Deposition of John A. Bishop.)

Q. Which portion of the expenses did you make the allowance in general average?

A. There were fares amounting to \$30.40; we allowed \$15.20 for general average.

Q. For what part?

A. There is a note: "December 1st, 2d, and 3d, account of discharging cargo. 20th and 21st account survey of vessel."

Q. What was the basis then of the apportionment?

A. The proportion which we considered proper in connection with the survey of the vessel to the owners.

Q. Why didn't you charge that to general average?

A. Because the damage to the vessel was particular average.

Q. What is the next item?

A. The next item is \$34.20 [483] and is charged to the owners; not allowed in general average.

Q. What is that for?

A. Mr. Thorndyke's trip to Portland in January 11th to 13th, receiving tenders for repairs.

Q. Why didn't you charge that to general average?

A. Because repairs are particular average and not connected with general average.

Q. What do you mean by particular average?

A. The sole concern of the owners so far as this statement is concerned. \$39.20, Mr. Thorndyke's expenses for trip from Seattle to Portland in February, 1912. That was in connection with the salvage.

(Deposition of John A. Bishop.)

That is allowed in general average. The next bill we have allowed is \$213.50 in general average out of a bill of \$556.05.

Q. What was the basis of that apportionment?

A. These were the master's expenses. Shall I give you the items which we allowed in general average?

Q. Yes, give all the items that you have allowed. I want to get at the basis of the apportionment; why you charged part to the general average and part to the owners.

A. We have allowed in general average the expenses of Captain Swenson, I think, it is up to the time the cargo was discharged. I will give you the items. Expenses at Astoria, 5 days, \$10.00. That is from October 14th to October 18th. And there is October 18th fare to Seattle, \$9.20. Telegram to San Francisco, \$2.80. Fares to Astoria, including Mr. Brown and self—Mr. Brown was the mate, \$19.20; half of that was allowed to general average. Expenses of Mr. Brown and self at Astoria, 4 days at \$2.00 per day each, \$16.00; one-half of that was allowed to general average, \$8.00. November the 12th, fare to Seattle, Mr. Brown and self, \$12.20— [484]

Q. (Intg.) When you speak of self you mean Captain Swenson?

A. Yes, sir. Meals for Brown and Captain Swenson, \$1.00. Fares to Astoria for Mr. Brown and Captain Swenson, \$19.20, of which \$9.60 was allowed to general average. Meals at Astoria for Mr. Brown and Captain Swenson, \$2.00 for which \$1.00 is al-

(Deposition of John A. Bishop.)

lowed to general average. Board and lodging at Astoria for Mr. Brown and Captain Swenson, \$4.00; \$2.00 is allowed to general average. Board and lodging for Captain Swenson, 9 days at \$2.00, \$18.00 and that is all allowed to general average. That was between November 1st and November 9th. Stationery and stamps, \$2.00 and allowed to general average. Daily expenses from December 10th to January 1st, \$22.00 allowed to general average. Fare to Seattle, including meals, \$7.60 allowed to general average. Expenses at Seattle January 2d, to January 4th, \$3.00 allowed to general average. Fare to Portland including board and lodging, January 5th, \$7.60 allowed to general average. Expenses January 5th to January 10th at Portland, \$10.00 allowed to general average. Error in charge of expense item from December 10th to January 1st, \$22.00 allowed to general average.

Q. That was what?

A. That was at Portland from December 10th, to January 1st.

Q. That was an error you say?

A. Yes, sir, there was a charge here—

Q. (Intg.) How did you ascertain that error?

A. There was a charge—

Q. Upon what information?

A. There was a voucher for it. Daily expenses of Captain Swenson from January 11th to February 6th, \$27.00 that was allowed to general average. Board for Captain Swenson from January 11th, to February [485] 6th, \$27.00 and allowed to general

(Deposition of John A. Bishop.)

average. Board for the master from February 7th to April the 6th, \$60.00 of which \$8.00 is allowed to general average. That is all.

Q. What were the reasons for allowing those items in general average?

A. We allowed them up to February 15th, when the vessel was abandoned and the cargo turned over to the cargo underwriters.

Q. What were the nature of the services for which the expenses were allowed?

A. Some one had to be left in charge of the vessel at Astoria and in charge of the cargo.

Q. Were these all after separation of interests?

A. After the cargo had been discharged and the vessel abandoned voyage, the cargo was turned over to the underwriters.

Q. Do you allow any expenditures after a separation of interests in general average? A. No, sir.

Q. You then speak of \$500.00 allowance of the master's wages?

A. We have allowed \$500.00 for the master's wages from October 15th, 1911, when the schooner was towed into Astoria until February 15th, when the cargo was turned over to the owners or underwriters of the cargo. The next item allowed under general average is \$4.22 for long distance telephones in November, 1911, January and March, 1912.

Q. Why did you not allow the item above that of \$93.66?

A. Services of first mate? We have not allowed

(Deposition of John A. Bishop.)

any portions of the mate's charges as general average,

Q. What is the next item?

A. \$23.54, telegrams from October to April; we allowed \$23.54 out of a total of \$52.88.

Q. In making that apportionment did you have a statement from the owners as to what those telegrams were for?

A. We generally see the telegrams, and I think we actually [486] did see them in this case. \$14.00 is the next item allowed in general average, that is for wharfage. We have allowed the wharfage up to and including February the 15th.

Q. That is when the separation of interests took place.

A. Yes, sir that is when the separation of interests took place.

Q. Did you allow the next item of the shipping commissioner for \$2.50 in general average?

A. No, sir, that is charged to the owners. \$5.70, that is charged to the owners.

Q. What is that charge of Mr. Nelson's?

A. I do not know what it was. We have nothing against it here at all.

Q. That is charged to the owners?

A. That is charged to the owners.

Q. Did you have before you the pay-roll of \$545.17? A. Yes, sir.

Q. Where did you charge that?

A. To the owners.

Q. Why did you not charge that to general average?

(Deposition of John A. Bishop.)

A. I think that pay-roll is up to October the 14th.

Q. The day when the crew were returned to Astoria? A. Yes, sir.

Q. The rest of the items contained in the adjustment are made up of the adjuster's commission for disbursing and advancing? A. No, sir.

Q. What is the next item of \$362.74?

A. That is commission for making disbursements.

Q. To whom was that allowed?

A. That was allowed to the people who paid the bills.

Q. Who were they? A. The owners.

Q. What is the next item of interest on general average?

A. Interest on general average disbursements from the time [487] the bills were paid to the time this adjustment was completed and the money collected.

Q. To whom does that interest go?

A. The owners who paid the bills. It is divided subsequently between the underwriters and owners. The underwriters advanced them money and they were credited with the proportion of the interest.

Q. How much of that \$435.29 was credited?

A. \$298.54, the underwriters were credited with.

Q. The next item is \$30.00 committee on adjustment?

A. That is the adjustment committee's fee of the Board of Marine Underwriters.

Q. San Francisco? A. Yes, sir.

Q. Was this adjustment submitted to the Board of

(Deposition of John A. Bishop.)

Marine Underwriters? A. Yes, sir it was.

Q. Was it approved or disapproved by them?

A. It was approved.

Q. What is the \$10.00 next appearing?

A. That is for notary charges for drawing affidavits.

Q. Are those the affidavits which appear in the first part of the adjustment? A. Yes, sir.

Q. What is the next item of \$10.00?

A. Drawing average bond and procuring signature.

Q. To whom did that payment go?

A. I think the adjusters; we drew the average bonds.

Q. What is the next one?

A. A bill for telegrams, \$17.25.

Q. The whole bill appears to be \$28.21; what was the basis of that apportionment?

A. We allowed the proportion of telegrams applying to general average and the balance charged to the owners.

Q. Were those telegrams sent by your office?

A. Those were [488] sent by our office.

Q. The next item of \$500.00 for services of the adjusters?

A. \$250.00 for making up the general average.

Q. Where did the other half go?

A. To the owners.

Q. What is the next item of \$409.94?

A. Collecting commission and settling general average.

(Deposition of John A. Bishop.)

Q. To whom did that commission go?

A. That I think is divided; I think we got a portion of it and I think the owners got a portion of it.

Q. What was the sum total of the general average? A. \$8780.01

Q. Was that subsequently apportioned between the various interests? A. Yes, sir.

Q. Is that shown in the adjustment?

A. It is shown on the following pages.

Q. What was the apportionment and how was it made?

A. The vessel was valued in damaged condition at \$8500.00 and pays its proportion \$5637.46. The cargo paid on the value of \$4738.24, \$3142.55.

Q. The latter figure was its proportion of the general average? A. Yes, sir.

Q. Did you make any segregation between the owners and the underwriters on the vessel of the proportion of the general average charged to the vessel.

A. We did.

Q. What segregation is that?

A. The vessel's proportion of general average \$5637.46, the underwriters on the vessel insured \$30,000.00 valued at \$45,000.00, they paid \$3758.31.

Q. Now, when you say "valued \$45,000.00" what do you mean by that? A. Valued in policy.

Q. Of the vessel?

A. Of the vessel in the policy. [489]

Q. Can you tell what credit of interest was allowed to the underwriters on the vessel?

A. \$119.42, that is the interest and then \$99.51

(Deposition of John A. Bishop.)

was the proportion of disbursing commission.

Q. What was the total credit allowed?

A. \$218.93.

Q. What was the total amount after allowing the credit just referred to payable by the underwriters on the vessel? A. \$3539.38.

Q. Did you ever receive on behalf of the Globe Navigation Company the payment of the balance just given? A. Yes, sir.

Q. From the Firemen's Fund Insurance Company?

A. There was an original payment on account made by the underwriters.

Q. What was it?

A. \$1990.29, that is the net payment on account which they made. They paid a little more than that, but there was an amount refunded at a later date. That left a balance due from the underwriters after giving them credit for the interest and disbursing commission applying to their payment on account \$1549.09.

Q. Did you collect that amount of money from the Firemen's Fund Insurance Company?

A. That was paid.

Q. Has the Firemen's Fund Insurance Company paid all of the general average chargeable against it as underwriter on the vessel under this adjustment?

A. I believe so, yes.

Q. Will you state whether or not this adjustment is made up in accordance with the settled practice on the Pacific Coast? A. It is.

(Deposition of John A. Bishop.)

Q. Have you the documents you sent for at your office? A. Yes, sir.

Q. Will you examine your letter file and see if you can find a letter with which you transmitted the rough adjustment to the owners and the letter from the owners which accompanied [490] the return of the adjustment?

A. Here is a letter dated, April 19th, 1913.

Q. Let me see it? A. Yes, sir (handing).

Mr. CAMPBELL.—I should like to offer that letter in evidence. With Mr. Clise's consent I will ask that the Reporter make a copy of the letter and substitute that for the original so that Johnson & Higgins may retain their files intact.

Mr. CLISE.—Yes, I have no objection to that.

(The letter is marked Respondent's Exhibit 3 and is as follows:)

“THE GLOBE NAVIGATION COMPANY,
“215-16 Globe Building,
“Seattle, Washington.

“April 19th, 1913.

“Messrs. Johnson & Higgins,
“San Francisco, California.

“Dear Sirs:

“We beg to acknowledge receipt of your advice of the 14th instant, also under separate cover, we received rough copy of adjustment ‘William Nottingham’ disaster October, 1911.

“We have made a careful examination of the adjustment, having gone into it with your Seattle firm, have also discussed it with Mr. H. R. Clise and

(Deposition of John A. Bishop.)

we are today returning it via registered mail.

"Some items charged against owners we do not fully understand, viz: United States Marshal's bill for \$354.15—\$45.10 of which is charged to owners.

We are unaware of any reason for charge. The charge of \$38.00 made against owners account Mr. H. R. Clise's trip to San Francisco on November [491] 18th, 1911, is not clear to the writer. The charges including Committee Fee, statement Master, Average bonds, telegrams, Adjuster's fee collecting commission seem to the writer to be high, especially as you seem to have made a charge of \$250.00 against owners for consultations and advice. We fail to remember such charges when our business was more important and when we had more frequent cases. However, we approve the adjustment and will be obliged if you will mail us fair copy at your early convenience, assuming, of course, if after our having called your attention to above items, you will change them if a change can be made.

"Yours very truly,

"THE GLOBE NAVIGATION COMPANY,

"By G. F. THORNDYKE,

"Manager."

Mr. CAMPBELL.—Q. I notice in the letter, Mr. Bishop, some question is made by the writer as to certain items which you have charged. Will you look at the letter so as to acquaint yourself with its contents? A. Yes, sir.

Q. Have you looked it over? A. Yes, sir I have.

Q. Was the adjustment changed by you as ad-

(Deposition of John A. Bishop.)

juster to conform to the criticism in the letter?

A. No, sir.

Q. Are you familiar with the policies of the Fireman's Fund Insurance Company covering on the "Nottingham"?

A. I think I have seen them, yes.

Q. I hand you a copy of the policy; are you familiar with the San Francisco form of hull time policy?

A. Yes, sir, I am.

Q. The San Francisco form of such policy which is used by the [492] Fireman's Fund Insurance Company? A. Yes, sir.

Q. Did you make demand on the Fireman's Fund Insurance Company for payment of its share of the general average? A. Yes, sir, we did.

Q. Under what clause or clauses of the policies did you make your demand on behalf of the owners on the Fireman's Fund Insurance Company for payment by that company of that proportion of the general average which has been charged against the underwriters on the vessel?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial.

A. The policy covers general average and salvage charges.

Mr. CAMPBELL.—Q. Will you point out the clause under which you made that demand?

A. There is a clause on the margin which states that the policy is intended to cover general average and salvage charges.

(Deposition of John A. Bishop.)

Q. Are there any expenditures in connection with the salvage of which you have knowledge, which were not charged to general average?

A. No, sir, nothing that I know of.

Q. There were a series of items testified to by Mr. Thorndyke on the hearing before the United States Commissioner at Seattle to which I call your attention and ask you whether or not those items were ever presented to you for your consideration as the adjuster, and whether or not, if not included in the statement as prepared by you, they are items which should go into the general average. The first item was \$163.70 and was testified to have been the expenses of Mr. Thorndyke on a trip to San Francisco to consult with Mr. La Boyteaux and the Fireman's Fund Insurance Company in connection with the "Nottingham"? [493]

Mr. CLISE.—I object to the witness testifying in regard to this item of expenditure mentioned was never submitted to them and also I object to the witness stating his conclusions if the item was presented to him on the ground that the same was incompetent, irrelevant and immaterial, and that it would call for the conclusion of the witness either in a matter not before him, or in any event.

A. \$163.70, I don't think that bill was ever submitted to us. I don't see it entered in this rough adjustment and if it had been submitted it would have been entered there and dealt with.

Q. Would it have been charged to general average, or not?

(Deposition of John A. Bishop.)

A. That would depend upon the nature of the interview. I do not know what took place.

Q. Did you charge to general average any of the expenditures reported to you for trips of either Mr. Clise or Mr. Thorndyke to San Francisco?

Mr. CLISE.—I object to the witness testifying on mere conjecture, what he might do if the matter had been presented to him. The witness has testified that this item was not presented to him and I object to the witness giving mere guess opinions.

Mr. CAMPBELL.—The record, of course, shows that the witness is an expert employed by the libellant.

Mr. CLISE.—The witness must bear in mind that he would pass upon the item when the same was presented to him and he cannot prejudge a claim that might be presented in the regular course.

A. I think you asked the question whether we had allowed any of Mr. Thorndyke's charges to San Francisco? [494]

Mr. CAMPBELL.—Q. Yes, in general average?

A. I think there is only one bill that was submitted to us for Mr. Thorndyke's expenses to San Francisco and a portion of that particular bill was allowed.

Q. How much was it for? A. \$107.00.

Q. What was the date of it?

A. November 12th to 18th.

Q. The next item is an expense of Mr. Thorndyke to Portland on May 4th, 5th and 6th, from which the testimony shows to have been made for a con-

(Deposition of John A. Bishop.)

ference and survey in Portland, bearing those dates, between Captain Crowe, Mr. Walker, Captain Gibbs and Mr. Page, for the purpose of reaching a settlement of the question of the Fireman's Fund Insurance Company under its policies for a total loss.

Mr. CLISE.—The same objection as to the question in regard to the other item.

Mr. CAMPBELL.—Q. Was that bill submitted to you for consideration? A. I do not think so.

Q. If it had been would you have allowed it in general average?

Mr. CLISE.—I object for the same reason stated when a like question was asked, because the witness cannot prejudge a claim that has never been presented to him.

A. All I can reply is that no expenses have been allowed in this adjustment after February the 15th, when the interests were separated.

Mr. CAMPBELL.—Q. Would you allow in general average any expenses incurred by either the owners of the vessel or the underwriters of the vessel, in making an effort to adjust the question as between themselves, as to whether or not there was a liability under these policies for a total [495] loss?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial and calling for the conclusion of the witness on a matter not before him.

A. I should say that would be a question where the cargo was not concerned.

Mr. CAMPBELL.—Q. Would you or would you

(Deposition of John A. Bishop.)

not allow it in general average?

Mr. CLISE.—The same objection.

A. I would not allow it in general average.

Mr. CAMPBELL.—Q. Can you advise me as to whether or not a bill for \$4.05 for coal oil used in maintaining a light on board the “Nottingham” while she was berthed at the Port of Portland’s dry-dock was ever presented to you?

Mr. CLISE.—The same objection as to the other items?

A. There were a number of items for riding lights while the vessel was in Astoria Harbor. I don’t think so.

Mr. CAMPBELL.—Q. If it was incurred after separation of interests would it have been allowed?

A. If it was incurred after February the 15th, it would not have been allowed.

Q. Was a bill for \$32.50 for the wages of a watchman from June 18th to June 30th ever presented to you? A. I think not.

Q. Would the same principle apply to that as to the preceding item with reference to the separation of interests?

Mr. CLISE.—The same objection.

A. Yes, sir.

Mr. CAMPBELL.—Q. Was a bill for \$16.60 for cleaning out the cabin between June 18th and June 30th ever presented to [496] you?

Mr. CLISE.—The same objection.

A. I think not.

Mr. CAMPBELL.—Q. The same principle would

(Deposition of John A. Bishop.)

apply based on the separation of interests?

Mr. CLISE.—The same objection.

A. My impression is there was no general average damage to this vessel; unless it arose from some general average damage, it would not be allowed.

Q. Was any general average damage allowed to the vessel in the adjustment?

A. No, sir, we have no record.

(A recess is here taken until 2 P. M.) [497]

AFTERNOON SESSION.

JOHN A. BISHOP, direct examination resumed.

Mr. CAMPBELL.—Q. Mr. Bishop, in making up an adjustment as a partial loss for labor and materials under the policies covering on the "Nottingham," on what repairs would you deduct one-third new for old?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial and it calls for the conclusion of the witness in a matter which is for the consideration of the Court.

A. Under this particular policy or any—

Mr. CAMPBELL.—Q. Under the particular policies covering on the "Nottingham"?

A. Would you repeat your question?

(The Reporter reads the question.)

A. Deduct from all repairs except from caulking and painting.

Q. Under what provision of the policy would you make that deduction?

Mr. CLISE.—The same objection.

A. Under the eighth paragraph.

(Deposition of John A. Bishop.)

Mr. CAMPBELL.—Q. Will you read all the provisions of the policy under which you make that deduction?

A. “It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by the perils insured against (except on Anchors, Copper and calking under the Copper), as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage, and their proceeds deducted from the gross loss.”

Q. Wherein, in that provision in that clause, is there anything which would make you not deduct one-third from caulking? [498]

Mr. CLISE.—The same objection.

A. Because it goes on to read: “And it is especially agreed that, instead of deducting one-third for new on the expense of re-metalling, including docking and calking, there shall be deducted two and one-half per cent of the cost of re-metalling, docking and calking, after deducting the value of the old metal and nails, for each and every month the metal shall have been on the vessel at the time when it is taken off; and if it shall have been on forty months or more, the cost shall be wholly borne by the insured.”

Mr. CAMPBELL.—Q. In lieu of deducting one-third off from the caulking, how would you treat the caulking under an adjustment of that character?

Mr. CLISE.—The same objection.

A. We would charge to the owners $2\frac{1}{2}$ per cent

(Deposition of John A. Bishop.)

of the cost of caulking for every month that the vessel had been caulked, from the date of the previous caulking.

Mr. CAMPBELL.—Q. Where do you find the provision which covers painting?

Mr. CLISE.—The same objection.

A. There is a continuation of this eighth paragraph: "In case the vessel shall be on a single bottom, the same rule shall apply to docking and caulking, but one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured."

Mr. CAMPBELL.—Q. Would you or would you not make a deduction on anchors, copper and caulking under the copper?

Mr. CLISE.—I object to the question for the same reason [499] heretofore given, because it is leading and suggestive.

A. The policy provides—

Mr. CAMPBELL.—Q. (Intg.) In what manner would you treat the anchors, copper and caulking under the copper with reference to deduction?

Mr. CLISE.—The same objection.

A. The anchors are allowed net with the exception of the wooden stock and the caulking, under the copper, we deduct two and one-half per cent for each month from the time the vessel was last caulked.

Mr. CAMPBELL.—Q. In what manner would you

(Deposition of John A. Bishop.)

treat nautical instruments with respect to deduction, or not?

Mr. CLISE.—The same objection.

A. One-third off; a deduction of one-third.

Mr. CAMPBELL.—Q. How would you treat all metal articles except anchors and copper?

Mr. CLISE.—The same objection.

A. A deduction of one-third.

Mr. CAMPBELL.—Q. What can you say as to whether or not the making of such adjustment, as you have testified to, is or is not in accordance with the settled practice on the Pacific Coast under this character or policy?

Mr. CLISE.—Objected to as incompetent, irrelevant and immaterial.

A. That method is the usual practice in adjusting losses under this particular form of policy. In regard to your previous question, I might say that there is no deduction of one-third off stores, like provisions and things of those kind, that are taken aboard; they are allowed net. [500]

Cross-examination.

Mr. CLISE.—Q. Mr. Bishop, I understand that the adjustment which you have made up covers a period commencing from the time the vessel reached Astoria up until there was a segregation of interest at St. Johns after the 8th of February; is that correct? A. Up to the 15th of February.

Q. Up to the 15th of February? A. Yes.

Q. And you do not include in the adjustment anything that occurred after that date, or anything that

(Deposition of John A. Bishop.)

occurred prior to the arrival of the vessel at Astoria?

A. The adjustment, in fact, covers from the time the vessel bore away for the port of refuge, but the crew had been taken off, therefore there is no allowance made for the crew's wages; if the crew had remained upon the vessel, there would have been an allowance for the crew's wages.

Q. For what time. I mean if the crew had remained on the vessel?

A. The charter was made under the York Antwerp rules, therefore, the wages would not have started until her arrival at Astoria.

Q. Irrespective whether the crew were on board or not?

A. If there was no crew on board, of course, there is no allowance for wages.

Q. Not from the time of the abandonment up until she arrived at Astoria?

A. There would only be an allowance for such members of the crew standing up to safe-guard the interests, which, in this case, was the captain.

Q. Now, in making up this adjustment, you relied upon the information that is furnished you by the owners?

A. And the documents which are supplied by the owners.

Q. Is it a frequent occurrence that items are omitted, say, [501] unintentionally by the owners?

A. We frequently ask owners for items which they

(Deposition of John A. Bishop.)

have omitted wherever we suspect that there has been an item omitted.

Q. That is no uncommon occurrence?

A. That is no uncommon occurrence.

Q. Then, you make the adjustment upon the information and documents as furnished to you?

A. Yes, sir.

Q. You testified that you requested the Globe Navigation Company for all bills and documents in reference to that. Now, that request was frequently made through your Seattle office, was it not? It was not always made direct to the Globe Navigation Company?

A. I think this case was handled direct between the San Francisco office and the Globe Navigation Company. I do not think anything was requested through the Seattle office.

Q. You think, then, that this did not pass through Mr. Becket's hands in any way?

A. I do not think so; I do not remember anything that passed through his hands.

Q. In the bills and charges furnished you by the Globe Navigation Company, you rejected a good many of them?

A. There were quite a number of items we charged to the owners' column, yes.

Q. You did that simply upon your own motion as an adjuster? A. Yes, sir.

Q. Now, there is Frank Walker's bill there for \$750.00 and you only allowed \$150.00. You did that simply because you considered \$150.00 as the only

(Deposition of John A. Bishop.)

charge to be allowed in general average?

A. Yes, sir; that is correct.

Q. You knew nothing about whether or not Mr. Walker was making these surveys in connection with other claims and [502] charges made under the policy, or not?

A. There were a number of dates here where surveys are made included in Mr. Walker's bills. The dates run from October to December and then again in May, 1912, which would lead us to suppose that there were surveys outside of the general average surveys and they must have been in connection with the damage to the vessel.

Q. So that you were not passing upon the question as to whether or not they were a just charge to be made under other provisions of the policy except the general average clause?

A. It is strictly general average.

Q. Anything you have to say is not to be taken to prejudice anything other than the general average claim?

A. This adjustment deals entirely with general average.

Q. In that dockage charge, you only allow \$20.00 and disallow \$79.34. There is an item there, as I understand, of \$99.34?

A. The \$20.00 is for the wharfage charge in December, ten days at \$2.00; we allowed that in general average. It was after the discharge of the cargo, but it was prior to the abandonment of the voyage.

Q. When is the charge of \$79.34—that is before

(Deposition of John A. Bishop.)

or after the segregation of interests?

A. No, sir, that is drydockage in December.

Q. Why do you disallow that?

A. Because it is entirely in connection with repairs which are of a particular average nature. Any damage to the vessel's bottom was particular average.

Q. Then, you think it was not necessary to dock the vessel in order to determine whether or not the vessel could be abandoned?

A. No, sir, I understand the dockage was [503] entirely in connections with repairs.

Q. Where do you get that understanding?

A. Even assuming that there were repairs of a particular average nature, the docking for examination of the damage to the bottom would not be general average.

Q. You do not take testimony in making up this adjustment?

A. We have the surveys before us, of course, and all the documents. The general average surveys ceases upon the recommendation of the surveyors to discharge the cargo. It is the first survey in the port of refuge which is allowed in general average which is in the interest of both ship and cargo.

Q. Had the surveyors recommended that the voyage be abandoned prior to this dockage?

A. I do not know when there was a recommendation to abandon the voyage.

Q. How can you determine this was a proper charge?

A. The only part of Mr. Walker's charges, which

(Deposition of John A. Bishop.)

are allowed in general average, are dealing with ship and cargo, that is, his recommendation to discharge the cargo for the purpose of repairs.

Q. But the cargo was on board at this time in December and if Mr. Walker had not completed his survey and had made no recommendation and it was necessary for him to have the vessel docked to complete his survey, why should not that go in as general average?

A. The cargo was discharged on December 21st, when the vessel went into the drydock.

Q. You mean prior to her going into the drydock?

A. She went up the river on November 29th, when the cargo was discharged. [504]

Q. Then, explain, Mr. Bishop, how you apportion \$150.00 to general average out of Mr. Walker's bill for \$750.00 and \$600.00 to owners?

A. That is a preliminary survey to determine whether or not the vessel was in fit condition to proceed on her voyage, or whether it was necessary for her to discharge the cargo and make repairs. The question of abandonment did not come up until much later.

Mr. CAMPBELL.—Q. That is abandonment of the voyage? A. Yes, sir.

Mr. CLISE.—Q. You do not allow him, then, anything for the services he rendered to determine whether or not the voyage could be abandoned?

A. No, sir.

Q. If it was necessary for Mr. Walker to make additional surveys to determine whether or not the

(Deposition of John A. Bishop.)

voyage could be abandoned, would not that be a proper charge for general average in determining what the liability of the ship and the cargo was?

A. No, sir, I do not see how it could be. The surveyor recommends the discharge of the cargo. The cargo is then placed on the wharf and is in the position of safety. Then the vessel is surveyed and the damage determined.

Q. Then the only allowance you make for Mr. Walker is the services he rendered at Astoria?

A. Yes, sir, at Astoria, the preliminary survey.

Q. Referring to this bill of \$556.05 of the master's, of that bill, how much did you allow as against general average and how much did you charge against owners? A. \$213.50.

Q. You allowed in general average?

A. Yes, sir, we allowed to general average. [505]

Q. And the balance you charged fully to the owners?

A. And the balance we charged fully to the owners.

Q. And the items are what you testified to in your direct examination? A. Yes, sir.

Q. When it came to the first mate, did you eliminate all of the first mate's expenses as well as any charge for services?

A. Yes, sir, we did not allow any of the first mate's charges.

Q. For expenses at all?

A. We did not allow any of his expenses or his wages.

(Deposition of John A. Bishop.)

Q. Why was that?

A. The master was acting—we allowed the master's on account that he was there as agent, that it was necessary for the owners to have someone there and the master acted as agent in the port of refuge.

Q. Have owners no discretion in matters of that kind as to whether or not to retain just one man or two men?

A. I do not know why the mate was there at all. You see the cargo had—the vessel had been abandoned, the crew were paid off, so that he was not standing there as a member of the crew, and it was necessary, of course, for the owners to have somebody there and we allowed the master's wages.

Q. But if the owners in the exercise of what they deem to be a wise discretion or they had a valuable ship and a valuable cargo, and deemed it necessary that not only they should retain the captain, but the first mate, are they allowed no discretion whatsoever in matters of that kind, where a vessel is in a port of refuge as this vessel was?

A. Well, it would depend, of course, upon the situation of the case. In this particular case, there were watchmen on the vessel, which were not necessary to have the mate and [506] master to watch the vessel, when the watchmen were already on. We were merely allowing the master as the agent.

Q. Then the discretion of the adjusters is to supersede the discretion of the owner in such cases, is it?

A. To a certain extent I suppose it does. We did

(Deposition of John A. Bishop.)

not see how the cargo was concerned in Mr. Brown; we do not know what Mr. Brown was there for at all. He did not seem to be there in connection with the cargo, because the master was doing everything in connection with that.

Q. But if the mate was there, say, at the wish of either the master or the owners, then should not a reasonable allowance be made, not only for his expenses but for his services?

A. Only if he is acting in a joint capacity in the interest of the cargo and the vessel.

Q. If he was?

A. If he was acting in that capacity, yes.

Q. What is the total disallowance made by you in making up this adjustment from the claims advanced by owners?

A. \$3,244.58, that includes that portion of our fee which we charged to the owners.

Q. There is no allowance made for pay-roll included therein?

A. No allowance for pay-roll. There is an item here for pay-roll, but it is the pay-roll which was charged to the owners, because it was only up to October 14th and there were no wages allowed in the case at all.

Q. Now, frequently, you take and make a division between owners and underwriters one-half. How do you make that kind of a division?

Mr. CAMPBELL.—What division do you refer to? [507]

Mr. CLISE.—Q. Of this item contained therein?

(Deposition of John A. Bishop.)

A. That depends, of course, on the circumstances of each particular case.

Q. But if we assumed that the vessel is valued at \$45,000.00 and the insurance is \$30,000.00, why would not a division of the basis be two-thirds and one-third?

A. This adjustment is entirely apart from the question of any insurance. The question of insurance does not come in in the division of any of these charges. It is only after the ship's proportion of the general average has been ascertained, that the question of insurance arises.

Q. But the adjustment must be based on the insurance policy?

A. No, sir, the adjustment is an adjustment of general average between the ship owner and the cargo owner; if the ship owner was uninsured, the adjustment of general average would be exactly the same.

Q. I understood you to testify this morning that the sum of \$5637.46 was the amount charged in the general average adjustment as against the hull?

A. That is the hull's proportion in general average.

Q. Now, you spoke of having allowed credits, that was the sum of \$3539.38 as the charge against the underwriters?

A. In the statetment there is an allowance for disbursing commission and interest on disbursements which is figured on the entire disbursements. Now, the underwriters having advanced a portion of that

(Deposition of John A. Bishop.)

money, received credit for their proportion of their cost and disbursement.

Q. Now, as I understand, you testified before they had \$1900.00? A. \$1990.00. [508]

Q. You add the interest and \$1990.00, that makes up the total to make the difference between \$5637.46 and \$3539.38?

A. No, sir, the \$5637.46 is the ship's proportion of general average. The amount due under the Fireman's Fund policy was \$3758.31; that is, I think, 30/45ths of the \$5637.46. The Fireman's Fund had paid towards those disbursements \$1990.29. We credited them with the \$1990.29 and also with the proportion of the collecting commission and the interest applying to that \$1990.29, making a total credit of \$2209.22; that left a balance of \$1549.09.

Q. Mr. Bishop, I understand you to make the unqualified statement, that in an adjustment of particular average, that one-third new for old would be deducted on account of all labor and materials, save and except caulking and painting and that you afterwards modified that by eliminating therefrom provisions? A. And anchors.

Q. And that you make no other exception, whatsoever. Is that correct?

A. Yes, sir, that is correct under a San Francisco form of policy. That does not include, of course, the cost of proving the claim like a survey fee or protest.

Redirect Examination.

Mr. CAMPBELL.—Q. Was any notice of omitted

(Deposition of John A. Bishop.)

items in the adjustment ever given to you by the owners?

A. No, sir, not that I am aware of. No, I think not.

Q. Were any items of omission or matters of criticism called to your attention, other than such as are implied in the letter offered in evidence this morning, Respondent's Exhibit 3? A. No, sir.

Q. I did not understand, Mr. Bishop, just what you said [509] about allowance of wages from the time of abandonment of vessel until her arrival at Astoria.

A. When I made that remark, Mr. Campbell, I had overlooked the fact that she had York Antwerp rules in the charter-party. Had there been no York Antwerp rules and had the crew been on board, the general average would commence at the time of deviating, coming into Astoria.

Q. Under the York Antwerp rules provided for in the charter party, would there have been any allowance for wages from the time that the vessel was in distress until she arrived at Astoria, even though the crew had stood by her? A. No, sir.

Q. Mr. Bishop, what was the reason for your not allowing in general average the wages of the mate from November 9th to February 12th?

A. The vessel having been abandoned, the crew paid off, he was not exactly a regular member of the crew, therefore, there was no allowance for crew's wages, but we allowed the master's wages merely as an agent looking after the joint interests until the

(Deposition of John A. Bishop.)

cargo was taken off and disposed of.

Q. Under the settled practice on this coast, allowance for how many agents in the port of refuge are customarily made?

A. We only allow one agent.

Q. Would the docking of the vessel for examination made for the purpose of making repairs or for the purpose of ascertaining whether the voyage should be abandoned, in any event be charged to general average?

A. It is a question that calls for a great deal of consideration. The practice is, when a vessel puts into a port of refuge for repairs, the first surveys are allowed in general average. That is merely to [510] determine whether or not the vessel is in condition to proceed on her voyage and whether it is necessary to discharge cargo. After that, the surveys in connection with all repairs are chargeable to the particular average, or if there was particular and general average repairs, then they would be apportioned between the two repairs. If the vessel proceeds on her voyage, the final certificate of the survey is also general average.

Q. I will ask you to examine this copy of the adjustment, which I have, and state whether or not it is a true and correct copy of the adjustment prepared by you. A. It is.

Q. Is it one of the copies which was issued by your office? A. It was issued by our office.

Q. Does it bear the signature of your firm?

A. It does.

(Deposition of John A. Bishop.)

Q. That is the adjustment with respect to which you have been testifying this morning?

A. It is.

Mr. CAMPBELL.—I offer that in evidence and ask that it be marked Respondent's Exhibit 4.

(The adjustment is marked Respondent's Exhibit 4.) [511]

Thursday, November 13th, 1913.

[**Deposition of George F. Thorndyke, for Libelant.**]

GEORGE F. THORNDYKE, called for the libelant, sworn.

Mr. CLISE.—Q. Mr. Thorndyke, on page 13 of your testimony taken before A. C. Bowman, United States Commissioner at Seattle, in this case you give a list of items going to make up the sum total referred to in paragraph 10 in libelant's complaint. I want to call your attention to a charge of \$56.70 and ask you to explain the occasion for that charge being made?

A. The occasion for the making of that charge was the sending of you, or the payment of your fare, from Seattle to San Francisco and return for the purpose of consultation with the adjusters and underwriters in San Francisco.

Q. Did you accompany me on that trip?

A. I did.

Q. What were your expenses on that trip?

A. \$107.00.

Q. How did you and myself happen to make that trip? Where was the "Nottingham" when this trip was made?

(Deposition of George F. Thorndyke.)

A. She was at Astoria, Oregon.

Q. Had there been any adjustment of the differences between yourself and the underwriters at that time?

A. I would not say that there had been any differences. We had matters that we wanted to take up with the underwriters for settlement and the principal underwriters were in San Francisco, and as a result of several talks with Mr. Taylor on the matter, he decided that we should go to San Francisco to the head office of the Fireman's Fund Insurance Company.

Q. At that time was not the "Nottingham" at Astoria and had you not given a notice of abandonment to the underwriters? [512] Had not the underwriters refused to accept an abandonment and refused to accept and take over the vessel, and do you not recall that difference? Were you and the underwriters in perfect accord as to what disposition was to be made with the "Nottingham"?

A. No, sir, we were diametrically opposed.

Q. Was or was not this trip to San Francisco for the purpose of adjusting the difference between the owners and the underwriters as to what disposition should be made of the "Nottingham" and her cargo and some conclusion arrived at as to what should be done with the schooner and her cargo?

A. Yes, sir.

Q. After the salvage difficulties were adjusted in February, 1912, did you make another trip to San Francisco accompanied by myself?

(Deposition of George F. Thorndyke.)

A. Yes, sir.

Q. How did you come to make that trip?

A. That trip was made as a result of an agreement in San Francisco with Mr. Levison of the Fireman's Fund Insurance Company, on the previous trip in November.

Q. What was the understanding or agreement that you refer to?

A. The agreement was, that on the first trip in November, that owing to the total unsettled condition of the affairs of the "Nottingham," that the underwriters did not care to take up anything in connection with her, and as spokesman for them Mr. Levison stated to us that he thought we should go back, that you and I should go back up north and proceed to have the vessel released from her libel and arrangements made to discharge the cargo, and dock the vessel and determine her damages and then return to [513] San Francisco for the purpose of a settlement.

Q. And do I understand that was the occasion for *occurring* the expenses of yourself and my coming to San Francisco at that time?

A. Entirely so.

Cross-examination.

Mr. CAMPBELL.—Q. Referring, Mr. Thorndyke, to the voucher for the \$56.70 and the \$107.00, which were for transportation and expenses of the trip of yourself and Mr. Clise to San Francisco in November, 1911, to discuss the situation which had resulted from the trouble to the "Nottingham" with

(Deposition of George F. Thorndyke.)

the adjusters, I do not understand you to say that Mr. Taylor directed you to come to San Francisco. He may have suggested it, but did he direct you to come to San Francisco?

A. No, sir, he did not direct us to come to San Francisco, but he implied that we should go to San Francisco if we wanted to get an adjustment and settlement of these affairs with the underwriters.

Q. At that time and at all times thereafter, the Fireman's Fund Insurance Company was denying any liability under its policies on the "Nottingham" for a total loss, for a claim of a total loss, was it not?

A. They refused to accept the abandonment which we gave them.

Q. And at all times adhered to that refusal, did they not?

A. Yes, sir, except that they discussed the case with us. They did not refuse to discuss the case.

Q. Grant that. There was a continued discussion between you over the case, and at no time did the Fireman's Fund Insurance Company recede from their refusal to accept a [514] notice of abandonment and their denial of any liability under their policies? A. No, sir.

Q. When you came down to San Francisco, both on your February trip and on your November trip, this dispute still existed, did it not? A. Yes, sir.

Q. And has ever since existed to the present time?

A. Yes, sir.

Q. When you said that Mr. Levison acted as

(Deposition of George F. Thorndyke.)

spokesman for the underwriters, what underwriters were you referring to, all of the underwriters who were interested in the venture; so to speak, underwriters on the cargo as well as those on the hull?

A. All the underwriters that he spoke of in his office at that time. He stated that the underwriters on the "Nottingham," and he spoke as if he meant other underwriters on the "Nottingham," or the people who had insured, taken part of the risk from the Firemen's Fund Insurance Company had assumed a position where they did not care to take any interest in the "Nottingham" matters at that stage of the proceedings.

Q. He did not ask you to come back to San Francisco again to discuss the settlement of the insurance companies liability under the policies, did he?

A. He implied it just that way, you will have to get the matters, that I testified to, straightened and then you will have to come back to San Francisco and try to reach a settlement.

Q. Are you sure that he ever told you that?

A. Yes, sir.

Q. Did you understand that to be an abandonment on the part of the insurance company of its refusal to accept your notice of abandonment?

A. No, sir, I did not. We knew that it was [515] a dispute and we were in hopes to reach some ground where we could settle the matter. Arbitration had been discussed and as a result of numerous interviews, he made this suggestion about as I have given it to you.

(Deposition of George F. Thorndyke.)

Q. Boiled down, both of these trips, the November trip and the February trip, were made for the purpose of you yourself and by Mr. Clise representing the Globe Navigation Company, endeavoring to reach a settlement with the underwriters of the question of liability or no liability under the policies?

A. Yes, sir.

Mr. CAMPBELL.—I think that is all.

Redirect Examination.

Mr. CLISE.—Q. At whose initiative were these trips taken; were they initiated by yourself or myself or by the Firemen's Fund Insurance Company or its representatives?

A. Well, I asked Mr. Taylor this question: Would any of the underwriters come here, would any of the representative underwriters of the San Francisco Firemen's Fund come to Seattle. He says, no, you will have to go to San Francisco to see them, none of them will come here; you had better go down to San Francisco.

Mr. CAMPBELL.—Q. That is, you had better go down to San Francisco if you wanted to negotiate with the officers of the company?

A. Yes, sir, if we wanted to negotiate with the officers of the company.

Mr. CLISE.—Q. How long have you been acting as the manager of the vessels owned by the Globe Navigation Company? A. Six years.

Q. Prior to that time were you in the employ of the company? [516]

A. Traffic manager and had nominally charge of

(Deposition of George F. Thorndyke.)

the operation of the vessels.

Q. How many vessels did the company own in the first place? A. Eight.

Q. What were they, schooners or steamers?

A. Three steamers and five schooners.

Q. Did you have the charge of the purchase of supplies for these vessels during this time?

A. Always.

Q. How many vessels does the company operate now? A. Five.

Q. What are they?

A. All wooden sail vessels.

Q. Are you familiar with the price of stores and supplies in Seattle in October, 1911? A. Yes, sir.

Q. During that time, were you purchasing supplies for these vessels in the Seattle market?

A. I was.

Q. Will you examine Mr. Walker's specifications and particularly with regard to the subsistence stores and state what was the fair value of the articles enumerated therein at the time tenders were asked for the repairs to the "Nottingham"?

A. \$1070.39.

Q. Now, referring to the chandlery stores, what was the fair market value at the same time and place for those stores? A. \$629.07.

Q. To the slop chest? A. \$356.70.

Q. To the galley and cabin equipment?

A. \$313.98.

Q. To the deck equipment? A. \$1204.92.

Q. The carpenters tools and donkey-room tools?

(Deposition of George F. Thorndyke.)

A. \$49.43.

Q. Navigation instruments? A. \$151.21.

Q. Now, were you acquainted with the value of supplies similar to those contained in the various headings that I have given [517] you, at Portland, Oregon? A. Very similar, the prices are.

Q. Have your vessels frequently been fitted out on the Columbia river? A. Yes, sir.

Q. And you have, during this time, purchased supplies there, have you?

A. Yes, sir, we buy supplies at both places, Seattle and Portland, Oregon.

Mr. CAMPBELL.—We move to strike all this testimony out on the ground it is irrelevant and immaterial, for the reason that all the items and equipment testified to were included in the bid of Mr. Cornfoot of the Albina Engine Machine Works.

Mr. CLISE.—Q. Referring again to your testimony at Seattle, you were asked this question:

“Q. You have stated already that on receipt of this notification from Mr. Plummer, you notified the representative of the Firemen’s Fund here in Seattle on Saturday afternoon, October 14, 1911?

“A. Yes, I think Mr. Taylor and I exchanged telephones that afternoon.”

Now, referring to that conversation, about what time, on Saturday, was it that you got this information?

A. It was late in the afternoon, I should say about three o’clock.

Q. When you notified Mr. Taylor of the informa-

(Deposition of George F. Thorndyke.)

tion you had received from Mr. Plummer, what did you say to him?

A. Can I make a statement regarding that matter?

Q. Yes. A. Regarding the whole thing?

Q. Yes, go ahead. Answer the question in such way as you see fit.

A. When I first testified in this case in Seattle, I was one of the first witnesses,—if not the first [518] witness called. I had not gone very deep into the case, and had not given it as much thought as I had reason to give it since then, and I stated that I thought we exchanged telephones at that time, but since that time, in thinking the matter over, in my office—thinking it over in connection with the times the testimony was taken and during those periods, keeping the matter constantly in my mind, why, I am now prepared to state that I called Mr. Taylor up in the afternoon of Saturday, the 14th of October, and notified him that I had received a telephone message from Mr. Plummer of the Puget Sound Tugboat Company, where he said to me, “Thorndyke, did you hear about the ‘Nottingham,’ ” and I said, “no,” and he said, “the ‘Nottingham’ had been dismantled and water-logged and abandoned at sea and the crew were taken off the ‘Nottingham’ by the schooner ‘David Evans,’ ” that he had received a wireless message from a master of one of his tugs—I think it was Bailey on the “Tatoosh,” to that effect, and I also stated to Taylor, that the “Nottingham” has probably gone, it would be the last of her, and that I guessed now she belonged to the under-

(Deposition of George F. Thorndyke.)

writers, and in that way, informed him of our intention to abandon the vessel because she was lost, she was dismasted and water-logged, and had no crew aboard, and was lost on the ocean.

Q. Whenever thereafter you received any information about the "Nottingham," did you communicate the same to Mr. Taylor of the Firemen's Fund?

A. Yes, sir.

Q. Why did you do so?

A. Well, I may have communicated information that I had regarding similar news; I might have [519] told him of a telegram that we had. I would not state positively that I did, or not.

Mr. CLISE.—At this time, I want to give notice to counsel for respondent, that it is our intention to apply for leave to amend our libel alleging abandonment on the 14th of November, instead of at the time alleged in the libel already filed.

Mr. CAMPBELL.—I shall oppose any such amendment under the record established in this case by your own witnesses. [520]

Cross-examination.

Mr. CAMPBELL.—Q. You knew this case was going to be tried in Seattle, did you not?

A. Yes, sir.

Q. You knew that your deposition was to be taken? A. Yes, sir.

Q. You had been in frequent consultation with Mr. Clise in preparation for it?

A. No, sir, not very frequent.

Q. Had you not been in consultation with him?

(Deposition of George F. Thorndyke.)

A. Yes, sir.

Q. You went over the whole case with him?

A. No, sir.

Q. You did not? A. No, sir.

Q. How did he prepare his case for trial then?

A. I do not know. He got such information as he required from me, but we did not go over the whole case. He would ask me questions.

Q. When you were put on the stand before, you were given ample opportunity to testify about everything that you wanted to, were you not?

A. Yes, sir.

Q. You went over this question of abandonment at that time, did you not?

A. I did not go over the question of this abandonment that I spoke of.

Q. You were examined in respect to it, were you not? A. Yes, sir.

Q. And you testified as to a conversation that you had with Mr. Taylor on Saturday afternoon?

A. Yes, sir.

Q. And at that time, you had no recollection of the facts about which you testified here this morning?

A. Yes, sir.

Q. You did not think about them?

A. I have stated now, that since that time, these matters have come to my mind. [521]

Q. What came to your mind since that time?

A. Numerous and various things.

Q. Tell me what they are.

A. The contact of the case in this office; the contact

(Deposition of George F. Thorndyke.)
of the case in Seattle.

Q. What is it that has made appear to your mind the significance of any such statement that you now have made amending your former testimony?

A. I stated I have taken a recourse to my memory.

Q. Have you read over this testimony since that time? A. Yes, sir.

Q. Where did you read it?

A. I read it in Seattle.

Q. Where did you get it, from Mr. Clise?

A. Maybe from Mr. Clise, or maybe from Judge Bogle.

Q. Have you discussed this particular point with either one of them? A. Yes, sir.

Q. Which one?

A. I discussed it with Mr. Clise.

Q. Did you discuss it with Judge Bogle also?

A. Yes, sir.

Q. That particular point you happened to discuss between you and your attorneys? A. Yes, sir.

Q. And after that discussion, you remembered this fact that you testified to now?

A. I remembered it before.

Q. It was a discussion that drew your attention to it?

A. No, sir, my recollection was the first thing that prompted the discussion.

Q. What was there about the suggestion that caused your recollection to go back to that conversation that caused you to change your testimony?

A. I read my statement regarding my telephoning

(Deposition of George F. Thorndyke.)

to Mr. Taylor; I saw it was even there not completed; we had quite a talk; that indicated there [522] all that was said on the telephone.

Q. What did Judge Bogle say to you about the significance of any such testimony?

A. I do not know that he said anything particular.

Q. Tell me what Judge Bogle said to you?

A. I do not remember that Judge Bogle addressed any remarks to me directly as to that.

Q. You just testified that he did.

A. I said we discussed the matter in his office.

Q. What did he say about this matter?

A. Why, he said that that was important; he said I should testify about that; if it is a fact, I should testify; it belonged in the case, and I should testify about it.

Q. He said it was important, did he?

A. Yes, sir, important testimony.

Q. And you discussed it quite at length, did you not?

A. No, sir, I was there only a short time.

Q. Did you not discuss with Judge Bogle what bearing it might have on your theory in this case?

A. I think very likely.

Q. After you discussed it with Judge Bogle, you went down and talked it over with Mr. Clise?

A. Yes, sir, I talked it over with Mr. Clise.

Q. After you had talked it over with Judge Bogle, did you not?

A. I talked it over with Mr. Clise after I talked it over with Judge Bogle.

(Deposition of George F. Thorndyke.)

Q. It was because of the conversation you had with Judge Bogle that you went and talked with Mr. Clise? A. I think quite likely. [523]

Q. Prior to the institution of this suit, did you give Mr. Clise the information, which he had, regarding the loss of the "Nottingham"?

A. I don't know that I understand.

Q. Where did Mr. Clise get his information as to the circumstances surrounding the damage to the "Nottingham"?

A. It came out in the course of interviews and my stories of what I had done in the matter. There were some things that in my direct statement there, that I did not tell you that prompted me to tell these things.

Q. When did you receive the telegram from the captain of the "Nottingham" which is contained in your notice of abandonment?

A. The same evening, it was telephoned my residence the same evening.

Q. What do you mean by saying in your notice of abandonment, "you are hereby notified that we have just received that telegram from the master"?

A. (No answer.)

Q. I am asking you when you got this telegram. Was this notice written immediately after you got the telegram?

A. I think that notice came in Saturday evening.

Q. Who prepared this notice of abandonment?

Mr. CLISE.—I want to interrupt the witness. There is no use testifying to things that are manifestly untrue. The evidence is that it did not arrive

(Deposition of George F. Thorndyke.)

until Sunday, November the 15th. He could not have received a message.

Mr. CAMPBELL.—Q. Who prepared this notice of abandonment?

A. Charles K. Poe.

Q. When did he prepare it, on Monday?

A. No, sir. [524]

Q. When?

A. Before 11 o'clock on Sunday, or rather that notice was typewritten on Monday, but it was prepared—the statement and the facts were prepared in the rough in the library of his residence on Sunday morning, as soon as I could get out there.

Q. What time was it that this was prepared?

A. On Sunday morning, the day following that I got my information.

Q. When did you serve it on the Fireman's Fund Insurance Company?

A. In the forenoon of Monday.

Q. It was written on that day?

A. I think it was typewritten that day, after he got down in his office. There was not a stenographer in his home.

Q. You swore to the libel that was filed in this case, did you not? A. Yes, sir.

Q. And the facts therein stated were true according to your knowledge and belief?

A. And recollection at that time.

Q. Your recollection, at the time this suit was instituted, was clearer than it is at the present time as to the events?

(Deposition of George F. Thorndyke.)

A. Not in lots of details. Things come up better now since I have been in contact with the case.

Q. You remember a great deal better now about this case, two years after the event, than you did in May of 1912 following the disaster?

A. Yes, sir, certain features of it, of course.

Q. But in May, 1912, you were right in the midst of this controversy with the Fireman's Fund Insurance Company? A. Yes, sir

Q. During the first days of May, you were in consultation [525] or in conference with Mr. Page representing the Fireman's Fund Insurance Company accompanied by myself, Mr. Taylor, Mr. Clise, Judge Bogle, Mr. Walker, Captain Gibbs and Captain Crowe, were you not? A. Yes, sir.

Q. And this libel was sworn to on the 10th day of May? A. Yes, sir.

Q. You say that your recollection two years after the event is clearer than it was at that time?

A. Why, certainly I do, for some things. I have exhibited to you in other circumstances, things that I remember, details in this case that I remember when other circumstances directed them to my mind; things I never thought of until I concentrated my mind to it; it is a question of concentration.

Q. What time was it, in the afternoon of Saturday, that you telephoned Mr. Taylor?

A. I say something about three o'clock; it may have been after.

Q. At his office? A. Yes, sir.

Q. Is Mr. Taylor usually at his office on Saturday afternoons?

(Deposition of George F. Thorndyke.)

A. I do not know; he was there that afternoon.

Q. What was the conversation that you had with him?

A. I stated to him the telegram. I stated to him regarding the wireless that Plumber reported that he had received and I also stated that the "Nottingham" was apparently a goner, as I remember using the expression at that time; that she was lost.

Q. You thought that you would have a claim on the underwriters?

A. Yes, sir, I thought she was gone. I did not expect to hear from her again.

Q. That is the information that you gave him? [526]

A. That is about the information that I gave him.

Mr. CAMPBELL.—That is all.

Redirect Examination.

Mr. CLISE.—Q. When the disaster to the "Nottingham" occurred, do you recollect where I was?

A. You were away from Seattle; I think you were in San Francisco.

Q. Do you know who prepared and presented this libel in this case for you? A. I think you did.

Mr. CLISE.—That is all.

[Deposition of John A. Bishop, for Respondent
(Recalled).]

JOHN A. BISHOP, recalled.

Mr. CAMPBELL.—Q. Mr. Bishop, will you turn to your adjustment and tell me whether you have entered therein any of the following items: \$545.17 paid to the crew? A. Yes, sir.

(Deposition of John A. Bishop.)

Q. Have you entered a pay-roll of the crew?

A. We have.

Q. What is the sum of it?

A. \$545.17, the pay-roll of the crew to October 14th, 1911.

Q. Where did you charge that?

A. I charged it to the owners column.

Q. Have you an item of \$2.50 for Shipping Commissioner? A. Yes, sir.

Q. And to whom is that charged?

A. To the owners.

Q. Commission of \$5.70?

A. To George A. Nelson, charged to the owners.

Q. Have you got \$37.50 as railroad fare to Astoria?

A. For Mr. Thorndyke, that is charged to general average.

Q. You have such a charge as that, have you?

A. Yes, sir. [527]

Q. For railroad fare?

A. For personal expenses incident to trip from Seattle to Astoria and return, dated October 16, 17 and 18 in connection with "William Nottingham" disaster, October, 1911.

Q. Have you a further charge of \$33.20?

A. Yes, sir, personal expenses of Mr. Thorndyke to Portland, Oregon, and return, October 25th to 27th.

Q. Charged to? A. General average.

Q. An item of \$56.70?

A. Yes, sir, it is for one round trip ticket, Seattle

(Deposition of John A. Bishop.)

to San Francisco and return.

Q. Where was that charged?

A. To the owners' column.

Q. Can you locate two items for long distance telephones, \$2.30 and a telegram, \$11.15?

A. Long distance phone, Seattle, Taylor, \$1.65.

Q. No, it is an item of \$2.30 and one of \$11.15?

A. No, sir, I do not think it is here.

Q. Have you \$4.00 for noting protest?

A. Yes, sir.

Q. To V. Boelling? A. Yes, sir.

Q. Charged to general average? A. Yes, sir.

Q. Have you an item of \$15.20 for railroad fares?

A. Fares of H. R. Clise and G. F. Thorndyke from Seattle to Portland. That is charged to general average.

Q. Now, an item of \$107.00 for railroad fares?

A. That is for personal expenses for trip to San Francisco to consult adjusters and underwriters, November 12th to 18th.

Q. For Mr. Thorndyke? A. Yes, sir.

Q. Where is it charged? A. Owners' column.

Q. Have you an item of \$72.60?

A. For personal expenses of Mr. Thorndyke for three trips to Portland during November, [528] on account of interviews with Port Commission, contracts for towing and discharging "William Nottingham," \$72.60, charged to general average.

Q. 55.50? A. No, sir.

Q. Have you got an item of \$188.00 of Mr. Clise, for trip to San Francisco? A. No, sir.

(Deposition of John A. Bishop.)

Q. Have you got an item there of \$3.00 for telegrams? A. No, sir.

Q. Have you got an item of \$51.40 for Mr. Thorndyke's trip to Portland?

A. For personal expenses for two trips to Portland December, 1911. We allowed \$27.80 in general average.

Q. The balance to owners?

A. The balance to owners.

Q. \$4.00 marshal's fees is charged to general average? A. Yes, sir.

Q. Have you charged to general average \$4.00 for marshal's fees?

A. For railroad fare, Portland to Astoria, for the return of two keepers, \$4.00 charged to general average.

Q. Can you find in the adjustment an item of \$8.23 for telegrams in December and \$4.43 for telegrams and long distance calls in January?

A. The only item I have got is long distance calls for November, January and March, \$8.45, and telegrams from October to April, \$52.88.

Q. Have you got \$34.43 for expenses for trip of Mr. Thorndyke to Portland?

A. No, sir, nothing like \$34.43.

Q. Have you got an item for \$34.20?

A. Yes, sir, trip to Portland January 11th to 13th.

Q. Charged to owners? A. Charged to owners.

Q. What have you allowed Captain Swenson for personal expenses on account of himself and Mr.

(Deposition of John A. Bishop.)

Brown for November, December [529] and January?

A. There was a bill of \$556.05 and we have allowed to general average \$213.50.

Q. Did you allow any of Mr. Brown's expenses in general average?

A. No, sir. There is a further bill of Captain Swenson for \$945.83 for services from August 27th, 1911, to April 12th, 1912, which we have allowed \$500.00 to general average, charging \$445.83 to the owners. We have allowed in general average his wages from October the 15th to February 15th, 1912. [530]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing depositions is that the testimony of the witnesses Wilfred Page, J. B. Levison, Charles R. Page, John A. Bishop and George F. Thorndyke is material and necessary in the cause in the caption of the said depositions named.

I further certify that on Tuesday, November 11th, Wednesday, November 12th and Thursday, November 13th, 1913, I was attended by H. R. Clise, Esq., proctor for the libellant, and Ira A. Campbell, Esq., proctor for the respondent, and by the witnesses who were of sound mind and lawful age, and that the witnesses were by me first duly cautioned and

sworn to testify the truth, the whole truth and nothing but the truth; that said depositions were, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Herbert Bennett, and afterwards reduced to typewriting; that the reading over and signing of said depositions of the witnesses was by the aforesaid stipulation expressly waived.

Accompanying said depositions and forming a part hereof and referred to and specified therein are "Respondent's Page Exhibit No. 1," "Respondent's Page Exhibit No. 2," "Respondent's Exhibit 3," and "Respondent's Exhibit 4," such exhibits are marked by me.

And I further certify that I have retained the [531] said depositions in my possession for the purpose of mailing the same with my own hand to the Clerk of the United States District Court for the Western District of Washington, Northern Division, the Court for which the same were taken.

And I do further certify that I am not of counsel nor attorney for any of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this —— day December, 1913.

[Seal]

FRANCIS KRULL,
U. S. Commissioner, Northern District of California,
at San Francisco,

[Indorsed]: Reporter's Transcript. Depositions of Wilfred Page, J. B. Levison, Charles R. Page and John A. Bishop on behalf of Respondent, and George F. Thorndyke on behalf of Libelant, taken before Francis Krull, U. S. Commissioner at San Francisco, California. Filed in the U. S. District Court, Western District of Washington, Northern Division. Dec. 24, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [532]

[Opinion.]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a
Corporation,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Defendant.

Filed April 14, 1915.

ACTION ON POLICY OF MARINE INSURANCE DECREE FOR PLAINTIFF.

H. R. CLISE, BOGLE, GRAVES, MERRITT
& BOGLE, for Plaintiff.

McCUTCHEN, OLNEY & WILLARD, IRA
A. CAMPBELL, BALLINGER, BATTLE, HULBERT & SHORTS, for Defendant.

NETERER, District Judge:

This is an action prosecuted by the plaintiff against the defendant to recover the sum of \$30,000.00 upon two policies of insurance issued upon the steamer "Wm. Nottingham," which, it is alleged, was lost by perils of the sea. To determine the issue, it is imperative that the conditions and specifications of the policy be understood. In the stipulations of the policy are the following provisions:

Specification 1. "No partial loss or particular average shall in any event be paid under this policy."

Specification 3. "Touching the adventures and perils which this insurance company is contented to bear, and takes upon itself in this Policy, they are of the seas * * * and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which the Insurers are liable by the rules and customs of insurance in San Francisco * * * and the provisions of the Civil Code of California, except such losses or misfortunes as are excluded by this policy."

Specification 5. "Not * * * to proceed to sea Grain laden, [533] except coastwise, without

a certificate from an inspector appointed by underwriters upon the hull or cargo, stating that the vessel is properly laden and fitted for her intended voyage."

Specification 7 contains the usual sue, labor and travel clause.

Specification 8. "It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by the perils insured against * * * as a commutation for the average difference of new and old * * * ."

Specification 9. "It is agreed that the insured shall not have the right to abandon the vessel unless the amount which this Company would be liable to pay under an adjustment, as of partial loss for labor and materials, (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured * * * ."

Upon the margin of the policy is endorsed the following:

"This insurance is against total and/or constructive total loss of vessel including general average and/or claims under three-fourths ($\frac{3}{4}$) running down clause."

Plaintiff in this case, bases its action upon constructive total loss. A constructive total loss is one which gives to a person the right to abandon, under Section 2717 of the Civil Code of California, which provides:

"A person insured by a contract of marine insurance may abandon the thing insured, or any particular portion thereof separately valued by

the policy, or otherwise separately insured, and recover for a total loss thereof, when the cause of the loss is a peril insured against:

1. If more than half thereof in value is actually lost, or would have *have* to be expended to recover it from the peril;

2. If it is injured to such an extent as to reduce its value more than one-half; * * * .”

Section 2721 of the same Code provides that abandonment is made by giving notice thereof to the insured, which may be done orally or in writing.
[534]

It is contended on the part of the defendant that the vessel was unseaworthy at the time it entered upon its voyage, and the implied warranty breached, and the policies avoided; that there was no total loss of the vessel within the terms of the policy and the law controlling the contract; that there was no constructive total loss, and contend that the marginal endorsement does not have operation over clauses 8 and 9 of the policy, and hence, under no manner of computation, could the loss be said to come within the provisions of law or the conditions of the policy.

I think that a reasonable construction of the policy must conclude that the endorsement of the policy must have operation. There was a purpose in the minds of the parties at the time the policy was issued, with relation to the conditions contained in this endorsement. It changes the stipulations in the body of the policy materially. They relate to a vital issue which must arise upon every loss under a policy, and all authorities agree that the marginal endorsement

must obtain over the written portion in the body of the contract, where they cannot be reconciled, and these having been entered by the party itself, must be construed most strongly against it.

The contention of the defendant that the vessel was unseaworthy and therefore the implied warranty was violated and the policy avoided, I think, is not well founded. Stipulation 5 in the policy might be construed as a stipulation with relation to the seaworthiness of the vessel, since it provides for a "certificate of fitness," in the event it carried certain commodities which are named, and that the implied warranty was thereby superseded by the express stipulation of the parties—*expressio unius est exclusio alterius*; but aside from this stipulation, the testimony, I think, is fairly conclusive that the vessel was seaworthy. She had just returned from a long voyage; she was in normal condition; she was laden and prior to [535] departure for the sea, was inspected and a certificate of seaworthiness issued. The vessel proceeded to sea on the 2d day of October, 1911. After entering upon the body of the ocean, she encountered a heavy storm which tore away one of the life-boats and flooded the donkey-room. On the morning of the 9th of October, the deck lashings parted and released the deck-load, which went overboard and carried with it the mainmast, the mizzenmast and the spanker-mast. The connections between the donkey-boiler and the water-tank were broken, and all fresh water was lost. A day or so later another heavy gale was encountered, accompanied by high seas. The vessel filled rapidly with

water. On the 13th it was water-logged and practically unmanageable. There was danger of her breaking up and being driven ashore. The officers and crew were compelled to leave and abandon the vessel for safety, and the vessel became a derelict. It was afterwards secured by a tug and brought to Astoria, Oregon, and the defendant, under the general average clause of the policy, contributed to certain expenses in caring for the vessel, and in its answer filed in this case, admitted liability, and did not at any time contend for unseaworthiness of the vessel until after the testimony was submitted in this case and amended answer filed. I think, under all of the circumstances, the contention of unseaworthiness cannot be sustained.

“Any forfeiture of a policy caused by a violation of its terms will be deemed waived by the insurer, if, after knowledge of the facts constituting such forfeiture, he treats the policy as obligatory.”

(Barber on Principles of Insurance, p. 96.)

The liability of the defendant, therefore, must be determined upon the question as to whether there was constructive total loss of the vessel. I think, under the evidence, that the master and crew were entirely justified in abandoning the vessel. No prudent man, as shown, would have continued with the vessel in her water-logged condition, and the voyage could not have been performed. [536]

A vessel may be abandoned,

“If the thing insured being a vessel, the contemplated voyage cannot be lawfully performed

without incurring a risk which a prudent man would not take under the circumstances."

(Civil Code of California, Section 2717.)

"The right of abandonment does not depend upon the certainty, but upon the high probability of the total loss either of the property or of the voyage, or both. The insured is to act not upon certainties, but upon the probabilities, and if the facts present a case of extreme hazard and the probable expense exceeding half of the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense."

(Royal Exchange Assurance Co. v. Graham & Morton Assurance Co., 166 Fed. 35.)

"The test usually employed in determining whether the loss is such as to permit the insured to abandon is to ascertain whether, under all of the circumstances attending the vessel, a prudent owner would have declined to repair, or in case of cargo whether it can be sent to its destination at a less expense than its value on arrival."

(29 Cyc. 692.)

"An absolute destruction is not necessary to recover the value of a policy," says the Supreme Court in *Great Western vs. Fogarty*, 86 U. S. 640.

In determining whether there is liability, the Court must determine whether the loss occasioned was more than one-half of the payment required under the policy. It is contended by the plaintiff that the boat was over-valued; that its real value was only \$30,000, or less, whereas the valuation was

placed at \$45,000, by the defendant, and that the estimate on right of abandonment value should be actual value. Whatever the actual value may have been, the parties are bound by their contract. The rate of insurance was based upon liability. The liability of the defendant is based upon valuation upon the vessel. The stated value fixed in the policy is conclusive.

“A valuation in a policy of marine insurance is conclusive between the parties thereto in an adjustment of either a partial or total loss.”

(California Code, Sec. 2736.)

In *Standard Marine Insurance Co. v. None Beach L. & T.* [537] Co., 133 Fed. 636, the Circuit Court of this Circuit, construing the provisions of the California Code applicable to this case, said:

“A valuation fixed in a policy is conclusive between the parties.”

In the “*Potomac*,” 105 U. S. 630, the Supreme Court of the United States, concerning valuations in a like policy, said:

“That valuation is conclusive in respect to all rights and obligations arising upon the policy of insurance.”

In view of what has been said, what is the loss and is the defendant liable upon this policy? The bids received for repair of the vessel range from \$20,059 to \$25,200. They are four in number. The average of all of the bids is \$23,455. The salvage adjustment amounts to \$5,399.46, making a total, based upon the average of the bids received for repair, of \$28,854. Under the marginal clause, the salvage

charges and general average are included. This would show a loss of more than one-half of the valuation of the vessel. Under the stipulations of the policy, one-third of the repairs is to be deducted for new and old. Taking the average of the bids submitted on repairs, deducting one-third for new and old, leaves \$15,636.67 amount of loss. Taking 30/45 of this, the amount to be paid by the defendant company, equals \$10,424.44, to which should be added salvage adjustment of \$5,399.46, making a total of \$15,823.90. This does not include other items which it is contended are properly chargeable under the general average clause. The question of abandonment is largely determined by the amount of loss. The vessel was actually abandoned by the master and crew. The plaintiff contends that the defendant was immediately, upon obtaining information of abandonment by master and crew, notified of the abandonment, by telephone, on Saturday night. This is denied by the defendant. That testimony is conclusive that on Monday morning a written abandonment was executed and [538] served upon the defendant. I think in view of the testimony in this case and the stipulations contained in the policy, together with the marginal endorsement, and the loss which was actually sustained, constructive abandonment was made. In *Victor Steamship Co. v. Western Assurance Co.*, 139 Pac. 808, the Supreme Court of California, in construing a provision of section 2705 of the California Civil Code which is applicable to this case, said:

“It is not necessary under this section that

there should be an actual abandonment. It is sufficient to make a constructive total loss if the right to abandon exists. * * * The existence of the right to abandon so as to make a constructive total loss is determined by the situation at the time of stranding. The question is whether at that time it would have been reasonably possible to bring the cargo into port without an expense of more than half of its value."

I think under all of the facts in this case, as disclosed by the evidence, the vessel having been actually abandoned and the steps taken by the plaintiff, that the Court should hold that there was an abandonment within the provisions of the law controlling this contract.

A. decree may be accordingly entered, for the plaintiff.

JEREMIAH NETERER,

Judge.

[Indorsed]: Opinion. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 14, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [539]

*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

Decree.

This cause having come on for hearing, and it having been suggested to the Court that the libelant herein, The Globe Navigation Company, has been adjudged a bankrupt during the pendency of this action; now, by consent of both parties, S. P. Weston, who has been heretofore duly appointed trustee in bankruptcy of said The Globe Navigation Company, a bankrupt, is hereby substituted as libelant in lieu of the said The Globe Navigation Company;

And thereupon said cause coming on for final hearing upon the pleadings and proofs, and having been argued by the proctors for the respective parties, and due deliberation being had thereon, and the Court being of opinion that libelant is entitled to recover from the respondent the full amount of the two policies of insurance sued upon, with interest thereon at the rate of six per cent per annum from June 30th, 1913, and costs of suit; and counsel for libelant having admitted and stated in open court

that for a valuable consideration passed from respondent to libelant, that respondent is [540] entitled to a deduction from the amount which, in the opinion of the Court, libelant is entitled to recover from respondent of Eighty-five Hundred Dollars (\$8500.00);

And it appearing that said sum of Thirty Thousand Dollars ((\$30,000.00), together with interest thereon amounting to the sum of Thirty-two Hundred Sixty-five & 0/100 Dollars (\$3265.00) to date hereof, and respondent's costs and disbursements herein taxed and allowed in the sum of One Hundred Fifty-four and 27/100 Dollars (\$154.27), making a total of Thirty-three Thousand Four Hundred Nineteen & 27/100 Dollars (\$33,419.27), less said sum of Eighty-five Hundred Dollars (\$8500.00), is the amount for which libelant is entitled to have judgment in this action, to wit, the sum of Twenty-four Thousand Nine Hundred Nineteen & 27/100 Dollars (\$24,919.27);

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the libelant, S. P. Weston, as trustee in bankruptcy of the Globe Navigation Company, bankrupt, do have and recover of and from the respondent, Firemen's Fund Insurance Company, the sum of Twenty-four Thousand Nine Hundred Nineteen & 27/100 Dollars (\$24,919.27), with interest thereon from this day, together with all costs hereafter incurred by said respondent herein, for all of which let execution issue.

ORDERED and DECREED in open Court this 23rd day of April, 1915. Respondent excepts to the

signing and entry of this Decree. Exception allowed.

JEREMIAH NETERER,
Judge.

[Indorsed]: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 23, 1915. Frank L. Crosby, Clerk. By E. M. L. Deputy. [541]

*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

IN ADMIRALTY—No. 2156.

THE GLOBE NAVIGATION COMPANY, a Corporation,

Libelant,

S. P. WESTON (Trustee in Bankruptcy of THE
GLOBE NAVIGATION COMPANY, a
Bankrupt),

Substituted Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

Notice of Appeal.

To Clise & Poe, and to W. H. Bogle, Proctors for the
Libelant and Substituted Libelant Above-
named; and to Frank L. Crosby, Clerk of the
Above-entitled Court:

You, and each of you, will please take notice that

the respondent above named hereby appeals from the final decree made and entered herein on the 23d day of April, 1915, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, Seattle, Washington, April 29, 1915.

McCUTCHEN, OLNEY, WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT &
SHORTS,

Proctors for Respondent and Appellant. [542]

Copy of within Notice received and due service thereof acknowledged this 30th day of April, 1915.

H. R. CLISE,

Attorney for Libelant.

[Indorsed]: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [543]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN ADMIRALTY—No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Libellant,

S. P. WESTON (Trustee in Bankruptcy of THE
GLOBE NAVIGATION COMPANY, a
Bankrupt),

Substituted Libellant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

**Order Fixing Amount of Bond on Appeal Staying
Execution.**

A decree having been signed and entered in the above-entitled cause by the above-entitled court on April 23, 1915, in favor of the libellant and substituted libellant above named, and the respondent above named having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, by filing in the office of the clerk of the above-entitled court and serving on proctors for the adverse parties a notice signed by it as appellant or its proctors, that it appeals to the United States Circuit Court of Appeals for the Ninth Circuit from said decree, and said respondent and appellant desiring to stay the execution of the said decree, and

having by its proctors of record moved this Court to fix by order the amount of the bond which it should file as a bond on appeal staying the execution of said decree, and all parties of record being represented by their proctors of record, the Court being fully advised in the premises;

IT IS NOW ORDERED AND ADJUDGED that, to stay the execution [544] of said decree, the appellant shall execute, together with good and sufficient sureties, a bond on appeal staying execution in the principal sum of \$30,000.00.

Done in open court this 30th day of April, 1915.

(ENTER) JEREMIAH NETERER,
Judge.

Copy of within Order Fixing Amount of Stay Bond received and due service thereof acknowledged this 30th day of April, 1915.

H. R. CLISE,
Attorney for Libelant.

[Endorsed]: Order Fixing Amount of Bond on Appeal Staying Execution. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [545]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN ADMIRALTY—No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Libelant,

S. P. WESTON (Trustee in Bankruptcy of THE
GLOBE NAVIGATION COMPANY, a
Bankrupt),

Substituted Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

Bond on Appeal Staying Execution.

KNOW ALL MEN BY THESE PRESENTS:
That we, Fireman's Fund Insurance Company, a
corporation organized and existing under and by
virtue of the laws of the State of California, as prin-
cipal, and Hartford Accident & Indemnity Company,
a corporation duly organized under the laws of the
State of Connecticut, and authorized to transact
business as surety within the Western District of
the State of Washington, as surety, are held and
firmly bound unto The Globe Navigation Company, a
corporation, a bankrupt, and to S. P. Weston, trus-
tee in bankruptcy of said The Globe Navigation Com-
pany, a bankrupt, the libelant and substituted libel-
ant above-named, in the sum of \$30,000.00 for the

payment of which well and truly to be made we bind ourselves and each of us, our, and each of our successors and assigns jointly and severally firmly by these presents.

SEALED WITH OUR SEALS AND DATED this 30th day of April, 1915.

WHEREAS, the respondent above named, Fireman's Fund Insurance [546] Company, a corporation, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree of the above-entitled court, signed and entered in the above-entitled cause on April 23, 1915, which decree orders that the said respondent shall pay to the said libelant and substituted libelant the sum of Twenty-four Thousand Nine Hundred Nineteen and 27/100 (\$24,919.27) Dollars, with interest thereon from April 23, 1915, together with all costs thereafter incurred by said respondent in said cause, and that execution issue therefor; and,

WHEREAS, said Fireman's Fund Insurance Company, a corporation, respondent above-named, desires during the process of such appeal to stay the execution of said decree of the above-entitled court;

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH that if the said Fireman's Fund Insurance Company, a corporation, respondent above-named, appellant, shall abide by and perform whatever decree may be rendered by said United States Circuit Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said United States Circuit Court of Appeals for the Ninth Circuit by the above-entitled court, then this obliga-

tion shall be void; otherwise, the same shall be and remain in full force and effect.

FIREMAN'S FUND INSURANCE COM-
PANY,

By FRANK G. TAYLOR,
General Agent.

HARTFORD ACCIDENT & INDEMNITY
COMPANY,

By B. C. SHORTS,
Attorney in Fact.

[Seal] Attest: R. C. ATKINSON,
Attorney in Fact. [547]

Copy of within Bond received and due service
thereof acknowledged this 30th day of April, 1915.

H. R. CLISE,
Attorney for Libelant.

[Indorsed]: Bond on Appeal Staying Execution.
Filed in the U. S. District Court, Western Dist. of
Washington, Northern Division. Apr. 30, 1915.
Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.
[548]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN ADMIRALTY—No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Libelant,

S. P. WESTON (Trustee in Bankruptcy of THE
GLOBE NAVIGATION COMPANY, a
Bankrupt),

Substituted Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

**Notice of Filing Cost Bond on Appeal and Bond on
Appeal Staying Execution.**

To Clise & Poe and to W. H. Bogle, Proctors for Li-
belant and Substituted Libelant Above-named:

Please take notice that the respondent above-
named has this day filed in the office of the clerk of
the District Court of the United States for the West-
ern District of Washington its cost bond on appeal
and its bond on appeal staying execution in the above-
entitled cause, both of which said bonds are executed
by said Fireman's Fund Insurance Company, a cor-
poration, as principal, and by Hartford Accident &
Indemnity Company, a corporation, as surety, and
that the address, residence and place of business of
R. C. Atkinson, who attested said bond as the attor-
ney in fact for said surety, is Office No. 607, Hoge

586 *Fireman's Fund Insurance Company vs.*

Building, Seattle, Washington, and that the address, residence and place of business of B. C. Shorts, who executed said bonds as attorney in fact for said surety, is Office No. 901, Alaska Building, Seattle, Washington. [549]

DATED, Seattle, Washington, April 30, 1915.

McCUTCHEN, OLNEY, WILLARD,

IRA A. CAMPBELL,

BALLINGER, BATTLE, HULBERT &

SHORTS,

Proctors for Appellant, the Respondent Above-named.

Copy of within Notice received and due service thereof acknowledged this 30th day of April, 1915.

H. R. CLISE,

Attorney for Libelant.

[Indorsed]: Notice of Filing Cost Bond on Appeal. Filed in the U. S. Dist. Court, Western Dist. of Washington, Northern Division. Apr. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [550]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN ADMIRALTY—No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Libelant,

S. P. WESTON (Trustee in Bankruptcy of THE
GLOBE NAVIGATION COMPANY, a
Bankrupt),

Substituted Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That we, Fireman's Fund Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of California, as principal, and Hartford Accident & Indemnity Company, a corporation duly organized under the laws of the State of Connecticut and authorized to transact business as surety within the Western District of the State of Washington, as surety, are held and firmly bound unto The Globe Navigation Company, a corporation, a bankrupt, and to S. P. Weston, trustee in bankruptcy of said The Globe Navigation Company, a bankrupt, the libelant and substituted libelant above-named, in the sum of Two Hundred Fifty (\$250.00) Dollars, to be paid unto said libelant and

substituted libelant, for the payment of which well and truly to be made we bind ourselves and each of us, our, and each of our successors and assigns jointly and severally firmly by these presents.

SEALED WITH OUR SEALS AND DATED
this 29th day of April, 1915.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH that whereas Fireman's Fund Insurance Company, a corporation, respondent above-named, as appellant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a decree of the above-entitled court, signed and entered herein on the 23d day of April, 1915;

NOW, THEREFORE, if the said Fireman's Fund Insurance Company, a corporation, appellant and respondent above-named, shall prosecute its appeal to effect and pay the costs, if the appeal is not sustained, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

FIREMAN'S FUND INSURANCE COMPANY,

By FRANK G. TAYLOR,

General Agent.

HARTFORD ACCIDENT & INDEMNITY
COMPANY,

By B. C. SHORTS,

Attorney in Fact.

[Seal]

Attest: R. C. ATKINSON,

Attorney in Fact. [551]

Copy of within Bond received and due service thereof acknowledged this 30th day of April, 1915.

H. R. CLISE,
Attorney for Libelant.

[Indorsed]: Cost Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 30, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [552]

[Stipulation and Order re Transmission of Original Exhibits, etc., to Appellate Court.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Corporation,

Libelant,

S. P. WESTON (Trustee in Bankruptcy of THE GLOBE NAVIGATION COMPANY, a Bankrupt),

Substituted Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that all exhibits introduced in the above-entitled cause, and in the depositions taken in said cause, be sent

590 *Fireman's Fund Insurance Company vs.*

to the United States Circuit Court of Appeals for the Ninth Circuit as original exhibits with the apostles on appeal.

CLISE & POE,

BOGLE, MERRITT, GRAVES & BOGLE,

Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD,

IRA A. CAMPBELL,

BALLINGER, BATTLE, HULBERT &

SHORTS,

Proctors for Respondent.

IT IS SO ORDERED.

JEREMIAH NETERER,

District Judge. [553]

[Indorsed]: Stipulation of Use on Appeal of Original Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 25, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [554]

*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

IN ADMIRALTY—No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Libelant,

S. P. WESTON (Trustee in Bankruptcy of GLOBE
NAVIGATION COMPANY, a Bankrupt),

Substituted Libelant,

vs.

FIREMEN'S FUND INSURANCE COMPANY, a
Corporation,

Respondent.

Assignment of Errors.

Comes now the FIREMEN'S FUND INSURANCE COMPANY, respondent and appellant herein, and says that in the record, opinion, decision and final decree in said cause there is manifest and material error, and said appellant now makes, files and presents the following assignment of errors in which it relies, to wit:

I.

That the District Court erred in entering the decree herein of date the 23d day of April, 1915, ordering, adjudging and decreeing that libelant, S. P. Weston (Trustee in bankruptcy of Globe Navigation Company, a bankrupt,) do have and recover of and from the respondent, Fireman's Fund Insurance Company, the sum of twenty-four thousand

nine hundred [555] nineteen and 27/100 (24,919.27) dollars, with interest thereon from the date of said decree, together with costs, thereafter incurred by respondent (appellant).

II.

That the District Court erred in entering the decree herein of date the 23d day of April, 1915, ordering, adjudging and decreeing that said libelant (appellee) do have and recover the sum of one hundred fifty-four and 27/100 (154.27) dollars, as costs.

III.

That the District Court erred in holding and deciding that the sum of thirty thousand (30,000) dollars, together with interest thereon amounting to three thousand two hundred sixty-five (3,265) dollars, to the date of said decree, and respondent's (appellant's) costs and disbursements in the sum of one hundred fifty-four and 27/100 (154.27), making a total of thirty-three thousand four hundred nineteen and 27/100 (33,419.27) dollars, less the credit sum of eighty-five hundred (8,500) dollars, was the sum for which libelant (appellee) was entitled to have judgment in the action herein.

IV.

That the District Court erred in not holding and deciding that respondent (appellant) was not entitled to any recovery in said action.

V.

That the District Court erred in not holding and deciding that the libel herein should be dismissed with costs to respondent (appellant). [556]

VI.

That the District Court erred in holding and deciding that the implied warranty of seaworthiness in the policies in suit was not violated and the policies not voided.

VII.

That the District Court erred in holding and deciding that the implied warranty of seaworthiness in the policies in suit was superseded by the express stipulation contained in condition 5 on the face of said policies.

VIII.

That the District Court erred in holding and deciding that the implied warranty of seaworthiness in the policies was superseded, as respected the seaworthiness of said vessel for the carriage of her cargo of lumber, by the express stipulation (condition 5 on the face of said policies) of the parties under the maxim *expressio unius est exclusio alterius*.

IX.

That the District Court erred in holding and deciding that the vessel was seaworthy.

X.

That the District Court erred in holding and deciding that respondent (appellant), by its answer filed in this case, admitted liability.

XI.

That the District Court erred in holding and deciding that respondent (appellant) did not at any time contend for unseaworthiness of the vessel until after the testimony was submitted in this case and

amended answer filed. [557]

XII.

That the District Court erred in holding and deciding that the contention of unseaworthiness could not be sustained.

XIII.

That the District Court erred in not holding and deciding that there was an implied warranty under the policies that the vessel should be seaworthy at the commencement of the voyage on which she was dismasted and the loss occurred which forms the basis of the action herein.

XIV.

That the District Court erred in not holding and deciding that the vessel sprung a leak in usual weather to be reasonably anticipated shortly after the commencement of her voyage without having encountered any perils of the sea sufficient to account for said leakage, and in not holding and deciding that by reason of said leakage a presumption of unseaworthiness at the commencement of her voyage was raised against said vessel.

XV.

That the District Court erred in not holding and deciding that the steam-pump was in an unseaworthy condition at the time an effort was first made to use the same on said voyage, and in not holding and deciding that by reason thereof a presumption of unseaworthiness at the commencement of her voyage was raised against said vessel.

XVI.

That the District Court erred in not holding and

deciding that the presumption of unseaworthiness arising from the springing a leak of said vessel immediately after the [558] commencement of her said voyage in usual weather to be reasonably anticipated without having encountered any peril of the sea sufficient to account for said leakage, was not overcome by any proof offered by libellant (appellee).

XVII.

That the District Court erred in not holding and deciding that the presumption of unseaworthiness raised against said vessel because of the condition of her steam-pump was not overcome by any proof offered by libellant (appellee).

XVIII.

That the District Court erred in not holding and deciding that the policies of insurance in suit herein were voided by the breach of the implied warranty of seaworthiness of said vessel.

XIX.

The District Court erred in not holding and deciding that respondent (appellant) was entitled to a decree dismissing said libel with costs.

XX.

That the District Court erred in holding and deciding that a constructive total loss under the policies in suit was one which gives to a person the right to abandon under Section 2717 of the Civil Code of California.

XXI.

That the District Court erred in holding and deciding that the clauses endorsed on the margins

of the policies in suit changed the stipulations in the bodies of the policies materially. [559]

XXII.

That the District Court erred in holding and deciding that the clauses endorsed on the margins of the policies in suit could not be reconciled with the provisions and conditions in the bodies of the policies.

XXIII.

That the District Court erred in holding and deciding that the vessel might be abandoned if the contemplated voyage could not be lawfully performed without incurring a risk which a prudent man would not take under the circumstances.

XXIV.

That the District Court erred in holding and deciding that the vessel might be abandoned if the facts presented a case of extreme hazard and that the probable expense would exceed one-half the value of the vessel, although it should happen that she was afterward recovered at a less expense.

XXV.

That the District Court erred in holding and deciding that the test in determining whether the loss is such as to permit the insured to abandon is such as to ascertain whether under all the circumstances attending the vessel a prudent owner would have declined to repair.

XXVI.

That the District Court erred in holding and deciding that in determining whether there is a liability, the Court must determine whether the loss

occasioned was more than one-half of the payment required under the policies. [560]

XXVII.

That the District Court erred in holding and deciding that the average for all the bids for repairs should be taken in determining whether a constructive total loss existed.

XXVIII.

That the District Court erred in holding and deciding that its calculations to determine whether or not a constructive total loss existed should be based upon the sum of twenty-three thousand four hundred and fifty-five (23,455) dollars as the average of all the bids received.

XXIX.

That the District Court erred in holding and deciding that the sum of five thousand three hundred ninety-nine and $46/100$ (5,399.46) dollars, designated as salvage adjustment, should be added to the average of the bids received for repairs for the purpose of determining whether a constructive total loss existed under the policies.

XXX.

That the District Court erred in holding and deciding that under the marginal clause the salvage charges and general average were to be added to the cost of repairs for the purpose of determining whether or not a constructive total loss existed under the policies.

XXXI.

That the District Court erred in holding and deciding that a loss of more than one-half of the

valuation of the vessel was shown. [561]

XXXII.

That the District Court erred in holding and deciding that under the stipulations of the policies one-third of the repairs is to be deducted for new and old.

XXXIII.

That the District Court erred in holding and deciding that the average of the bids submitted for repairs should be taken, or that one-third new for old should be deducted therefrom.

XXXIV.

That the District Court erred in holding and deciding that the amount of the loss was fifteen thousand six hundred and thirty-six and $67/100$ (15,636.67) dollars.

XXXV.

That the District Court erred in holding and deciding that the amount of loss should be determined by taking the average of the bids submitted on repairs and deducting one-third for new and old.

XXXVI.

That the District Court erred in holding and deciding that $30/45$ of the sum of fifteen thousand six hundred and thirty-six and $67/100$ (15,636.67) dollars should be taken to determine the amount to be paid by respondent (appellant).

XXXVII.

That the District Court erred in holding and deciding that the amount to be paid by respondent (appellant) equals the sum of ten thousand four

hundred twenty-four and 44/100 (10,424.44) dollars.

[562]

XXXVIII.

That the District Court erred in holding and deciding that the so-called salvage adjustment of five thousand three hundred ninety-nine and 46/100 (5,399.46) dollars should be added to the aforementioned sum of ten thousand four hundred twenty-four and 44/100 (10,424.44).

XXXIX.

That the District Court erred in holding and deciding that the amount to be paid by the defendant company made a total of fifteen thousand eight hundred twenty-three and 90/100 (15,823.90) dollars.

XL.

That the District Court erred in holding and deciding that other items not referred to in its opinion were properly chargeable under the general average clause.

XLI.

That the District Court erred in holding and deciding that other items not included in the general average adjustment offered in evidence were properly chargeable under the general average clause.

XLII.

That the District Court erred in holding and deciding that the question of abandonment is largely determined by the amount of loss.

XLIII.

That the District Court erred in holding and deciding that a constructive abandonment was made.

[563]

XLIV.

That the District Court erred in holding and deciding that Section 2705 of the Civil Code of California was applicable to this case.

XLV.

That the District Court erred in holding and deciding that the decision of the Supreme Court of California in *Victoria Steamship Company v. Western Assurance Company*, 139 Pac. 808, is applicable to this case.

XLVI.

That the District Court erred in holding and deciding that no acts of abandonment were necessary under the policies in suit in this action.

XLVII.

That the District Court erred in holding and deciding that there was an abandonment within the provisions of the law controlling the contract and policies in suit.

XLVIII.

That the District Court erred in holding and deciding that under the facts in the case, as disclosed by the evidence, and because of the vessel having been actually abandoned at sea, and the steps taken by plaintiff (appellee), there was an abandonment within the provisions of the law controlling the contract and the policies in suit.

XLIX.

That the District Court erred in holding and deciding that on its opinion filed herein a decree should be entered for plaintiff (appellee). [564]

L.

That the District Court erred in not holding and deciding that the marginal clauses endorsed on the policies, and the clauses in the bodies and on the backs of the policies, were to be construed, if possible, so that all clauses could stand and have effect.

LI.

That the District Court erred in not holding and deciding that the marginal clauses endorsed on the policies, and the clauses in the bodies and on the backs of the policies, were to be construed so that all clauses could stand and have effect.

LII.

That the District Court erred in not holding and deciding that the clauses endorsed on the margin of said policies were consistent with the clauses in the bodies and on the backs of the policies, so that all clauses could stand and have effect.

LIII.

That the District Court erred in not holding and deciding that no verbal abandonment was made on October 14, 1911.

LIV.

That the District Court erred in not holding and deciding that no valid and effective abandonment was made on October 14, 1911.

LV.

That the District Court erred in not holding and deciding that no valid and effective abandonment was made on October 16, 1911. [565]

LVI.

That the District Court erred in not holding and

deciding that no sufficient grounds existed on October 16, 1911, for the giving of a valid and effective notice of abandonment as for constructive total loss of said vessel under said policies.

LVII.

That the District Court erred in not holding and deciding that the insured (libellant) under the policies in suit should not have the right to abandon the vessel ("Nottingham") unless the amount which respondent (Appellant) would be liable to pay under an adjustment as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) should exceed one-half the amount insured by the policies.

LVIII.

That the District Court erred in not holding and deciding that, in determining the amount which respondent (appellant) would be liable to pay under an adjustment as of partial loss for labor and materials for the repair of the damages suffered by said vessel, one-third should be deducted from the cost of all repairs of injuries and losses on the vessel by the perils insured against (except on anchors, copper and calking under the copper) as a commutation for the average difference between new and old; and that instead of deducting one-third for new on the expense of remetaling, including docking and calking, there should be deducted 2½% of the cost of remetaling, docking and calking, after deducting the value of the old metal and nails, for each and every month the metal shall have been on the vessel at the [566] time when it was taken off; and if it

shall have been on forty months or more, that the cost should be wholly borne by the insured (libelant), and the vessel ("Nottingham") being on a single bottom that the same rule should apply to docking and calking, but one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, that the whole cost was to be borne by the insured (libelant) and that when the vessel, being on a single bottom, was docked for the purpose of repairing and recalking her keel or bottom by reason of having stranded, that the expense of docking should be proportioned *pro rata* upon the calking and other repairs in proportion of the number of days' work expended upon each respectively, as provided by clause 8 on the face, and rule 2, section 2, on the back of the policies in suit.

LIX.

That the District Court erred in not holding and deciding that the insured (libelant) did not have the right to abandon the vessel for the reason that the amount which respondent (appellant) would be liable to pay under an adjustment as a partial loss for labor and materials (exclusive of salvage and general average expenses and the cost of funds) did not exceed one-half the amount insured by the policies, to wit, fifteen thousand (15,000) dollars.

LX.

That the District Court erred in not holding and deciding that the insured (libelant) did not have the right to abandon the vessel for the reason that the amount which respondent (appellant) would be liable

to pay under an [567] adjustment as a partial loss for labor and materials, including the general average and salvage charges, did not exceed one-half the amount insured by the policies, to wit, fifteen thousand (15,000) dollars.

LXI.

That the District Court erred in holding and deciding that general average and salvage charges should be added to the amount which respondent (appellant) would be liable to pay under an adjustment as of partial loss for labor and materials in determining the right of libellant (appellee) to abandon said vessel as for a constructive total loss.

LXII.

That the District Court erred in not holding and deciding that a constructive total loss did not exist under the policies in suit for the reason that libellant (appellee) did not have the right to abandon its interest in said vessel as for a constructive total loss under the terms and conditions of the policies in suit.

LXIII.

That the District Court erred in not holding and deciding that the right to abandon said vessel as for a constructive total loss under said policies was determined by the terms and conditions contained in clauses 8 and 9 on the faces of said policies, and the rules for adjustment of losses, and particularly rule 2 thereof, on the backs of said policies.

LXIV.

That the District Court erred in not holding and deciding that, if general average and salvage charges

were to be added to the amount for which respondent (appellant) [568] would be liable to pay an adjustment as a partial loss for labor and materials, to make a constructive total loss of said vessel under said policies, the amount of general average and salvage charge to be so added was the sum of three thousand seven hundred fifty-eight and $31/100$ (3,758.31) dollars.

LXV.

That the District Court erred in holding and deciding that any other losses or expenditures were chargeable in general average other than those so charged and included in the general average adjustment prepared by Johnson & Higgins, adjusters appointed by libelant (appellee), offered in evidence in said cause.

LXVI.

That the District Court erred in not holding and deciding that the bid of the Albina Engine & Machine Works in the sum of twenty thousand nine hundred fifty (20,950) dollars for the repair of said vessel should be taken as the basis for determining the cost of repairing the damage to said vessel for the purpose of ascertaining whether or not under the terms and conditions of the policies in suit a constructive total loss of said vessel existed.

LXVII.

That the District Court erred in not holding and deciding that no other items for repairs other than those contained in the specifications and on which bids were received and not otherwise agreed to between libelant and respondent, should be included

in the estimate of the cost of repairing said vessel for the purpose of determining whether or not under the terms and conditions of the policies in suit a constructive total loss existed. [569]

LXVIII.

That the District Court erred in not holding and deciding that libelant (appellee) had not sustained the burden of proof resting upon it to show that the amount which respondent (appellant) would be liable to pay under an adjustment as of partial loss for labor and materials, (exclusive of salvage or general average expenses and costs of funds) exceeded one-half the amount insured, for the purpose of determining whether or not a constructive total loss existed under said policies.

LXIX.

That the District Court erred in not holding and deciding that libelant (appellee) had not sustained the burden of proof resting upon it to show that the amount which respondent (appellant) would be liable to pay under an adjustment as of partial loss for labor and materials (inclusive of the general average and salvage charges) exceeded one-half the amount insured, for the purpose of determining whether or not a constructive total loss existed under said policies.

LXX.

That the District Court erred in not holding and deciding that libelant (appellee) had not sustained the burden of proof resting upon it to show that a constructive total loss of said vessel existed under the terms and conditions of the policies in suit.

LXXI.

That the District Court erred in not holding and deciding that a constructive total loss of said vessel did not exist under the policies in suit, and in not [570] directing that a decree should be entered in said action dismissing the libel and adjudging costs to respondent (appellant).

LXXII.

That the District Court erred in not holding and deciding, if a constructive total loss existed, that the sum of three thousand seven hundred fifty-eight and $31/100$ (3,758.31) dollars should be credited upon the total amount covered by said policies, to wit, upon the sum of thirty thousand (30,000) dollars.

LXXIII.

That the District Court erred, if a constructive total loss of said vessel existed under said policies and a valid and sufficient abandonment thereof was made, in not crediting the general average charges paid by respondent (appellant) to wit, the sum of three thousand seven hundred fifty-eight and $31/100$ (3,758.31) dollars upon the total amount insured by said policies, to wit, upon the sum of thirty thousand (30,000) dollars.

In order that the foregoing assignment of errors may be and appear of record said appellant files and presents the same, and prays that such disposition be made thereof as in accordance with the law and the statutes of the United States in such cases made and provided, and said appellant prays a reversal of the decree herein heretofore made and entered in the above cause and appealed from, [571] and

that it may have such other and further relief as shall be deemed meet and equitable.

DATED: May 26th, 1915.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT &
SHORTS,

Proctors for Respondent and Appellant.

Receipt of a copy of the within assignment of errors is hereby admitted this 28th day of May, 1915.

CLISE & POE,
Proctor for Libelant.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 29, 1915. Frank L. Crosby Clerk. By E. M. Lakin, Deputy. [572]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

FIREMAN'S FUND INSURANCE COMPANY, a
Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent,

S. P. WESTON (Trustee in Bankruptcy of GLOBE
NAVIGATION COMPANY, a Bankrupt),
Substituted Respondent.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

You will please prepare the apostles in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in said court, and include in said apostles the following pleadings, proceedings and papers on file, to wit:

1. All those papers required by section 1 of paragraph I of rule 4 of the rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit. [573]

2. All the pleadings in the said cause, including the libel, and amended libel, and the answers to the same, with any and all exhibits annexed to said pleadings.

3. All the testimony and other proofs adduced in the cause, including the testimony taken at the trial; all depositions taken by either party and admitted in evidence; all exhibits introduced by either party, said exhibits and all of them to be sent up to said Circuit Court of Appeals as original exhibits.

4. The opinion and decision of the Court.

5. The final decree, notice of appeal, cost bond on appeal, and notice of filing of bond.

6. The assignment of errors.

We hereby waive our right to have the record in this cause printed by the clerk of the above-entitled court, and hereby elect to have said record printed by the clerk of the United States Circuit Court of

610 *Fireman's Fund Insurance Company vs.*

Appeals for the Ninth Circuit.

McCUTCHEN, OLNEY & WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT &
SHORTS,

Proctors for Libelant.

[Indorsed]: Praecipe for Apostles on Appeal.
Filed in the U. S. District Court, Western Dist. of
Washington, Northern Division. May 25, 1915.
Frank L. Crosby, Clerk. By E. M. L., Deputy.
[574]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Libelant.

S. P. WESTON (Trustee in Bankruptcy of THE
GLOBE NAVIGATION COMPANY, a
Bankrupt),

Substituted Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

**Certificate of Clerk U. S. District Court to Apostles,
etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 774 pages, numbered from 1 to 774 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington. [575]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the respondent and appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

612 *Fireman's Fund Insurance Company vs.*

Clerk's fee (Sec. 828 R. S. U. S.)	
for making record, certificate or	
return, 1443 folios at 15c.....	\$216.45
Certificate of Clerk to transcript of	
Record, 4 folios at 15c.....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to Original Ex-	
hibits, 3 folios at 15c.....	.45
Seal to said Certificate.....	.20
	<hr/>
Total.....	\$217.90

I hereby certify that the above cost for preparing and certifying record amounting to \$217.90, has been paid to me by Messrs. McCutchen, Olney & Willard, Ira A. Campbell, Esq., and Messrs. Ballinger, Battle, Hulbert & Shorts, Proctors for Respondent.

IN WITNESS whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 27th day of July, 1915.

[Seal]

FRANK L. CROSBY,

Clerk U. S. District Court. [576]

[Endorsed]: No. 2631. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company a Corporation, Appellant, vs. The Globe Navigation Company, a Corporation, and S. P. Weston, as Trustee in Bankruptcy of the Globe Navigation Company, a Corporation, Bankrupt, Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the

Western District of Washington, Northern Division.
Filed July 30, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Libelant,

S. P. WESTON (Trustee in Bankruptcy of THE
GLOBE NAVIGATION COMPANY, a
Bankrupt),

Substituted Libelant.

vs.

FIREMAN'S FUND INSURANCE COMPANY, a
Corporation,

Respondent.

**Order Enlarging Time [to July 1, 1915] to Transmit
Apostles on Appeal to Circuit Court of Ap-
peals.**

Now, on this 27th day of May, 1915, upon motion
of proctors for respondent, and for sufficient cause
appearing, it is ordered that the time within which
the clerk of this court may prepare, certify and

transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 1st day of July, 1915.

JEREMIAH NETERER,

District Judge.

[Endorsed]: No. 2156. In the District Court of the United States, for the Western District of Washington. The Globe Navigation Co., a Cor., Libelant, S. P. Weston, etc., Substituted Libelant, vs. Fireman's Fund Insurance Co., a Cor., Respondent. Order Enlarging Time to Transmit Apostles on Appeal to Circuit Court of Appeals. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 27, 1915. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

No. 2631. United States Circuit Court of Appeals, for the Ninth Circuit. Order Under Rule 16 Enlarging Time to July 1, 1915, to File Record thereof and to Docket Case. Filed Jul. 30, 1915. F. D. Monckton, Clerk.

*In the District Court of the United States, for the
Western District of Washington, Northern Division.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Corporation,

Libelant,

S. P. WESTON (Trustee in Bankruptcy of THE
GLOBE NAVIGATION COMPANY, a
Bankrupt),

Substituted Libelant.

vs.

FIREMAN'S FUND INSURANCE COMPANY, a
Corporation,

Respondent.

**Order Enlarging Time to [August 1, 1915] to
Transmit Apostles on Appeal to Circuit Court
of Appeals.**

Now, on this 26th day of June, 1915, upon motion of proctors for respondent, and for sufficient cause appearing, it is ordered that the time within which the clerk of this court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 1st day of August, 1915.

JEREMIAH NETERER,

District Judge.

[Endorsed]: No. 2156. In the District Court of the United States, for the Western District of Washington. The Globe Navigation Co., a Cor., Libelant, S. P. Weston, etc., Substituted Libelant, vs. Fireman's Fund Insurance Co., a Cor., Respondent. Order Enlarging Time.

No. 2631. United States Circuit Court of Appeals, for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 1, 1915, to File Record thereof and to Docket Case. Filed Jul. 30, 1915. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

Apostles on Appeal.
(IN TWO VOLUMES.)

FIREMAN'S FUND INSURANCE COMPANY, a
Corporation,

Appellant,

vs.

THE GLOBE NAVIGATION COMPANY, a Corpora-
tion, and S. P. WESTON, as Trustee in Bank-
ruptcy of the GLOBE NAVIGATION COM-
PANY, a Corporation, Bankrupt,

Appellees.

VOLUME I.
(Pages 1 to 320, Inclusive.)

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

Filed

AUG 25 1915

F. D. Monckton,

United States
Circuit Court of Appeals

For the Ninth Circuit.

Apostles on Appeal.
(IN TWO VOLUMES.)

FIREMAN'S FUND INSURANCE COMPANY, a
Corporation,

Appellant,

vs.

THE GLOBE NAVIGATION COMPANY, a Corpora-
tion, and S. P. WESTON, as Trustee in Bank-
ruptcy of the GLOBE NAVIGATION COM-
PANY, a Corporation, Bankrupt,

Appellees.

VOLUME I.
(Pages 1 to 320, Inclusive.)

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

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*In the District Court of the United States for the
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No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
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Libelant.

S. P. WESTON (Trustee in Bankruptcy of GLOBE
NAVIGATION COMPANY, a Bankrupt),

Substituted Libelant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

Names and Addresses of Counsel.

EDWARD J. McCUTCHEN, Esq., Proctor for
Respondent,

1107 Merchants Exchange Building, San
Francisco, California.

WARREN OLNEY, Jr., Proctor for Respondent,

1107 Merchants Exchange Building, San
Francisco, California.

CHARLES W. WILLARD, Esq., Proctor for Re-
spondent,

1107 Merchants Exchange Building, San
Francisco, California.

IRA A. CAMPBELL, Esq., Proctor for Respondent,
Merchants Exchange Building, San Fran-
cisco, California.

RICHARD A. BALLINGER, Esq., Proctor for Re-
spondent,

901 Alaska Building, Seattle, Washington.

2 *Fireman's Fund Insurance Company vs.*

ALFRED BATTLE, Esq., Proctor for Respondent,
901 Alaska Building, Seattle, Washington.

R. A. HULBERT, Esq., Proctor for Respondent,
901 Alaska Building, Seattle, Washington.

BRUCE C. SHORTS, Esq., Proctor for Respondent,
901 Alaska Building, Seattle, Washington.

H. R. CLISE, Esq., Proctor for Libelant,
405-409 New York Building, Seattle, Wash-
ington. [1*]

C. K. POE, Esq., Proctor for Libelant,
405-409 New York Building, Seattle, Wash-
ington.

WM. H. BOGLE, Esq., Proctor for Libelant,
609-616 Central Building, Seattle, Wash-
ington. [2]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Libelant.

S. P. WESTON (Trustee in Bankruptcy of GLOBE
NAVIGATION COMPANY, a Bankrupt),
Substituted Libelant.

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Respondent.

*Page-number appearing at foot of page of original certified Apostles
on Appeal.

Statement.

Time of commencement of suit: May 13, 1912.

Names of parties: The Globe Navigation Company, a corporation, libelant.

S. P. Weston (Trustee in Bankruptcy of Globe Navigation Company, a bankrupt), substituted libelant.

Fireman's Fund Insurance Company, a corporation, respondent.

Dates when pleadings were filed: Complaint, May 13, 1912. Answer to Complaint, June 13, 1912. Amended Complaint, March 10, 1914. Answer to Amended Complaint, March 31, 1914. Reply, April 13, 1914.

Issuance of process and service thereon: On May 13, 1912, Summons was issued against Fireman's Fund Insurance Company, a corporation, and same was delivered to Marshal for service. On the 14th day of May, 1912, Marshal returned the same into the Clerk's office with return indorsed thereon showing service upon the General Agent of above-named Respondent. [3]

Reference to Commissioner: Cause was referred to Commissioner A. C. Bowman to take and report the testimony, and on November 2, 1914, said Commissioner duly returned into the Clerk's office his transcript of the testimony so taken, together with the exhibits offered in evidence before said Commissioner.

Time of trial: This cause was submitted to the Honorable Jeremiah Neterer, Judge of the District

schooner "Wm. Nottingham" hereinafter referred to. That it is duly authorized to do business in the State of Washington, and has paid its annual license fee as such corporation last due to the State of Washington.

II.

That the Fireman's Fund Insurance Company is a corporation organized and doing business under the laws of the State of California, and duly authorized to do business in the State of Washington, and maintaining an office in said State for the transaction of its business.

III.

That on the 17th day of April, 1911, the defendant made to plaintiff a policy of insurance, a copy of which is hereto annexed, for the sum of Six Thousand Dollars, on the schooner "Wm. Nottingham" against the perils of the sea and other perils [5] therein mentioned, during the time in said policy set forth, which is hereto annexed marked Exhibit "C."

IV.

That on or about the 2d day of October, 1911, said schooner sailed from Westport, on the Columbia River, for Calloa, Peru, carrying a cargo of lumber, and while engaged on said voyage, and on October 8th, 1911, said schooner encountered a terrific wind, which tore away one of the two life-boats, flooded the donkey-room and put out the fire under the donkey-boiler. Said gale continuing, early on the morning of the 9th of October the deck lashings parted and released the deck-load, a part of which went

overboard, and carried with it the first or mainmast, then the mizzenmast and last the spankermast. The connections between the donkey-boiler and the water-tank were broken and all fresh water was lost, and the schooner became completely filled with water. Through the efforts of the master and crew the vessel was nearly cleared of water, when another heavy gale came up, accompanied by high seas, which caused her to again fill rapidly. These conditions continued until the 13th, when the schooner, being water-logged and being practically unmanageable, there was great danger of her breaking up and being driven ashore, so that the officers and crew, for the safety of their lives, were compelled to leave and abandon her and seek safety in finding their way to the shore, and the said schooner being thereupon abandoned by her officers and crew, became a derelict, having lost, in addition to the three masts, all gaffs, beams, blocks, sails and running and standing rigging, and all iron work, and being otherwise damaged.

V.

That at about twelve o'clock noon on October 1, 1911, the steam tug "Wallula," owned and operated by the Port of Portland, Oregon, found said schooner "Nottingham," a derelict and abandoned by her officers and crew, off the mouth of the Columbia River, [6] and took her in tow and brought her to the port of Astoria, Oregon.

VI.

That on October 16, 1911, The Globe Navigation Company, the plaintiff herein, gave to the Fireman's Fund Insurance Company a notice of its abandon-

ment of said vessel to said Insurance Company, said notice being in writing, a copy of which is hereto-attached marked Exhibit "B" and made a part of this complaint.

VII.

That from and after the 15th day of October, 1911, the officers and crew of said tug "Wallula" remained in possession of said schooner "Wm. Nottingham," and at all times refusing to deliver possession of said schooner until about the 6th day of November, 1911, in an action entitled "In the District Court of the United States for the District of Oregon," wherein the Port of Portland, a municipal corporation, and E. D. Parsons and others as master and crew of said tug "Wallula," were libelants, and directed against said schooner "Wm. Nottingham," her tackle, apparel, furniture, etc., such proceedings were had that the United States Marshal thereupon entered into possession of said schooner, etc., upon a claim made by said libellants for salvage for a large sum of money, alleging said schooner to be of the value of thirty thousand dollars and her cargo still laden on board to be of the value of four thousand dollars.

VIII.

That by an order of said District Court, dated November 27, 1911, said Marshal was directed to remove said schooner from Astoria, Oregon, to St. Johns, Oregon, it appearing that the cargo still on board said schooner could not be discharged and safely stored at said Astoria, Oregon, and there was no dry-dock at said Astoria, Oregon, and that in order that the cargo might [7] be discharged and

safely stored and said vessel drydocked it was necessary to cause said removal, which was accordingly done by said marshal.

IX.

That is was thereafter mutually agreed between the parties in interest, including the parties to this action, that said schooner should be relieved of the salvage claims of said libellants, together with the expenses incurred in said proceedings, and on or about the 8th day of February, 1912, the following sums of money were paid for the following purposes, to deliver said vessel from the possession of the United States Marshal, to wit:

Paid Port of Portland for salvage claims of libellants.....	\$3,000.00
Paid Port of Portland account towage from Astoria to Portland.....	150.00
Paid Port of Portland, dockage schooner..	79.32
Paid Port of Portland, berth at dry-dock wharf.....	98.00
Paid Port of Portland, storage of lumber.	638.79
Paid Brown & McCabe, stevedores, dis- charging lumber laden on board.....	1,245.50
Paid Port of Portland for longshoremen, etc., at Astoria harbor.....	80.00
Paid Port of Portland, account watchman.	181.00
Paid Port of Portland, miscellaneous charges.....	66.90
Paid U. S. Marshal, account fees.....	405.31
Paid Clerk U. S. District Court, account fees.....	26.25

\$5,971.07

X.

That in addition to the sums so expended, as appears by paragraph nine of this complaint, The Globe Navigation Company, for the joint benefit of itself and the Fireman's Fund Insurance Company, has expended in and on account of said schooner and in and on account of the salvage claim made as aforesaid, the [8] additional sum of \$2,462.45.

XI.

That the Trust Company of America, trustee mortgagee in Policy No. 103,834 of said defendant, has for value received sold, transferred and assigned all its right, title and interest in and to said policy of insurance, and any money due or to become due thereunder to the plaintiff.

XII.

That said voyage was so utterly broken up and lost, and said schooner and her outfits, cargo and stores were totally lost by the perils of the sea and perils insured against in said policy, and the defendant had due notice thereof, and became bound to pay the sum insured in said policy to the plaintiff, together with said salvage and additional charges, as provided in said policy.

XIII.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court, and that said defendant is within said jurisdiction.

For a second cause of action against said defendant:

I.

Plaintiff repeats the allegations contained in para-

10 *Fireman's Fund Insurance Company vs.*

graphs one and two of its first cause of action herein, to the same intent and purpose as if set forth at length herein, and makes said paragraphs a part of its second cause of action.

III.

That on the 17th day of April, 1911, the defendant made to plaintiff a policy of insurance for the sum of Twenty-four Thousand Dollars on the schooner "Wm. Nottingham" against [9] the perils of the sea and other perils therein mentioned, during the time in said policy set forth, which said policy of insurance is identical in every respect with the policy referred to in paragraph three of plaintiff's first cause of action, a copy of which is annexed to this complaint, save and except that the sum insured is twenty-four thousand dollars instead of six thousand dollars, and in case of loss, to be paid to this plaintiff instead of the Trust Company of America, and that the premium therefor was the sum of twelve hundred dollars instead of the sum of three hundred dollars, and the plaintiff incorporates here all the other terms and conditions of said policy, the same as if set forth at length herein.

IV.

Plaintiff repeats the allegations contained in paragraph four, five, six, seven, eight, nine, ten, twelve and thirteen of its first cause of action herein, to the same intent and purpose as if set forth at length herein, and makes said paragraphs a part of this its second cause of action.

WHEREFORE, plaintiff prays judgment as against said defendant for the sum of Thirty Thou-

sand Dollars damages on account of the loss of said schooner "Wm Nottingham," and for such other and further sums as said defendant may be liable to the plaintiff on account of the loss of said schooner, and expenses incurred by said plaintiff incident to the matters and things set forth in its bill of complaint herein, and for such other and further relief in the premises as in law and justice it may be entitled to receive, and for its costs in this behalf expended.

H. R. CLISE,
W. H. BOGLE,
Attorneys for Plaintiff.

Postoffice Address:

405 New York Building,
Seattle, Washington. [10]

United States of America,
State of Washington,
County of King,—ss.

George F. Thorndyke, being first duly sworn, on oath says, that he is the manager of the Globe Navigation Company within the State of Washington. That he has read the foregoing bill, knows the contents thereof and that the matters and things therein stated are true as he verily believes, and that the matters and things therein stated are peculiarly within his knowledge, he having the control and management of plaintiff's affairs within said State.

GEORGE F. THORNDYKE.

12 *Fireman's Fund Insurance Company vs.*

Subscribed and sworn to before me this 10th day of May, 1912.

[Seal]

H. R. CLISE,
Notary Public in and for the State of Washington,
Residing at Seattle. [11]

Exhibit "B" [to Complaint].

Seattle, Wash., Oct. 16th, 1911.

Fireman's Fund Insurance Company,
Colman Bldg.,
Seattle, Wash.

Dear Sirs:

You are hereby notified that we have just received telegram from the Master of the Schooner "Wm. Nottingham," of which the following is a copy.

"Confirm Nelson's telegram 'Nottingham' filled October eight lost deckload and masts went by the board October ninth. Abandoned vessel October thirteenth latitude north 46.16, longitude west 125.25 fore and after part of vessel gutted lost all fresh water. Do you authorize me to pay crew?"

In consequence of the damages sustained we hereby abandon to you the schr. "Wm. Nottingham" and claim for a total loss under the policies issued by you and outstanding upon her.

It will give us great pleasure to give you any information that you may require, or any assistance we can render in order to protect you. At present

we are not informed as to the particulars.

Yours truly,

THE GLOBE NAVIGATION COMPANY,
GFT/G. Per G. F. THORNDYKE. [12]

Exhibit "C" [to Complaint].

No. 103,834 Hull Time. \$6000

**FIREMAN'S FUND
INSURANCE COMPANY
SAN FRANCISCO, CALIFORNIA.**

IN CONSIDERATION OF Three Hundred.....
Dollars to it agreed to be paid by the insured herein-
after named by these presents Insures Six thousand
Dollars on account of

THE GLOBE NAVIGATION COMPANY
In case of Loss to be paid to The Trust Company of
America, Trust Mortgagee.

From the 20th day of April, 1911, at noon until
the 20th day of April, 1912, at noon Pacific Standard
time upon his or their interest as owners in the body
machinery, tackle, apparel, and other furniture of
the good schooner "Wm. Nottingham," Vessel Val-
ued at Forty-five Thousand Dollars.

The insured in accepting this policy, hereby binds
himself or themselves according to the following
agreements and stipulations:

1st. In case of loss, same to be paid in sixty days
after proof and adjustment of loss and proof of in-
terest in the said vessel, (the amount of the notes
given for premium, if unpaid, being first deducted,
and all sums due or coming due to the Company
from the insured being first paid or secured to the

satisfaction of the Insurers,) but no partial loss or particular average shall in any event be paid under this Policy. This Company not to be liable for any sums the insured may pay to another vessel, her cargo or freight, for or on account of collision.

If on a passage at expiration of the term, with liberty to the insured to renew the Policy for three months at the same rate of premium, if application be made to the Company on or before expiration of the first term. The risk, however, is to terminate at any port, or place at which the vessel may first arrive during said extended time, on her being moored therein in good safety. A pro rata premium to be returned for each entire month not entered upon of the extended time, no claim being made.

2d. Each passage subject to separate average. A new passage shall be deemed to begin as soon as the vessel shall have discharged her Cargo at a Port or place of destination, or such part of her cargo as may be destined to such Port or place; or if in ballast, or not discharging her cargo, twenty-four hours after she shall have been moored in good safety at such Port or place of destination. [13]

3d. Touching the adventures and perils which this Insurance Company is contented to bear, and takes upon itself in this Policy, they are of the Seas, Fires, Pirates, Assailing Thieves, Jettisons, Barratry of the Mariners (but not of the Master), embezzlement and illicit trade, or any trade in articles contraband of war excepted in all cases, and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part

thereof, to which insurers are liable by the Rules and Customs of Insurance in San Francisco, including the Rules for Adjustment of losses printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this policy.

4th. Not to use any ports or places on the west coast of the United States of America south of San Francisco except Santa Cruz, Monterey, San Simeon, Port Harford, Gaviota, Goleta, Santa Barbara, San Buena Ventura, Hueneme, Port Los Angeles (Santa Monica), Redondo, San Pedro, Newport and San Diego. Nor any ports and places on the west coast of America north of San Francisco nor islands adjacent thereto, except Umpqua and Columbia Rivers, Humboldt, Coos and Shoalwater Bays, Gray's Harbor, Sitka, Ounalaska and St. Paul's Harbor and Ports inside the mouth of the Straits of Fuca. Not to use any inside passage on the west coast of America north of Comox, Vancouver Island, nor ports or places on the east coast of Asia north of Shanghai, nor Islands adjacent thereto, except ports in Japan. Not to use ports and places on the coast of Mexico between July 1st and November 1st. Not to use Torres Straits nor any Guano Islands, nor to engage in any inter-island trade, nor to use any ports or places in the South Pacific Ocean situated between the Equator and latitude 30 degrees south, and between longitude 120 degrees west and 155 degrees east between December 1st and March 31st, except Taiohai, Marquesas Islands, and Papeete, Society Islands, nor to go on a

Valuation
\$45000.

16 *Fireman's Fund Insurance Company vs.*

whaling, fishing, sealing or trading voyage. It shall and may be lawful however for said vessel, in her voyage, to proceed and sail to, touch and stay at any ports or places if thereunto obliged by stress of weather or other unavoidable accident without prejudice to this insurance.

5th. Not to load more than net registered tonnage with Guano, Salt, Iron, Stone, Ore or Lime. Not to carry bituminous coal in bulk, except between ports in the Pacific Ocean. Not to carry Grain in bulk, nor to proceed to sea Grain laden, except coastwise, without a certificate from an Inspector appointed by Underwriters upon the hull or cargo stating that the vessel is properly laden and fitted for her intended voyage.

6th. This Company is not to be held liable in general average or otherwise for Sum Insured \$6000.- jettison of deck cargo unless the vessel is stranded, nor for wages and provisions, except when the same are a general average charged by the custom of the port of destination; nor in case of insurance upon a steamer for any injury to the machinery or boilers, nor for loss or damage to the vessel itself caused by explosion of boilers, unless occasioned by stranding, striking the ground, sinking, burning or collision with another vessel; nor for fuel, wages or provisions, or expenses of delay consequent upon repairs of any kind on any steamer except in general average for wages and provisions of that portion of the crew absolutely necessary for the navigation of the vessel; nor for any claim for loss or expense arising from capture, seizure, de-

tention, destruction, or the consequences of any attempt thereat by any hostile nation, or by any government, or by any officer, civil or military, claiming to act in its name or under its authority; nor by any insurgent or [14] revolutionary power (piracy excepted), anything herein to the contrary notwithstanding; also warranted not to abandon in case of blockade, and free from any expense in consequence thereof, but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

7th. In case of any loss or misfortune resulting from any peril insured against, the party insured hereby engages for himself or themselves, his or their factors, servants and assigns, to sue, labor and travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured or any part thereof, and also to use all proper and legal means to recover, through general average, or otherwise, from the parties interested in Freight or Cargo, either or both, any and all sums due to the vessel or its owners on account of sacrifices, losses or expenses, incurred for the general safety or the common good, to the charges whereof this Company will contribute in proportion as the sum insured is to the whole sum at risk; nor shall the acts of the Insured or Insurers in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment.

Rate Per
cent 5

8th. It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by the perils insured (except on

Anchors, Copper and calking under the Copper), as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage, and their proceeds deducted from the gross loss. And it is especially agreed that, instead of deducting one-third for new on the expense of re-metaling, including docking and calking, there shall be deducted two and one-half per cent of the cost of re-metaling, docking and calking, after deducting the value of the old metal and nails, for each and every month the metal shall have been on the vessel at the time when it is taken off; and if it shall have been on forty months or more, the cost shall be wholly borne by the Insured. In case the vessel shall be on a single bottom, the same rule shall apply to docking and calking, but one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured.

9th. It is also agreed that the insured shall not have the right to abandon the vessel unless the amount which this Company would be liable to pay under an adjustment, as of partial loss for labor and materials, (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured; and when the vessel is in a port or place where she can lie in safety, she shall in no case be sold for or on account of the insurers, until the estimated cost of repairs shall have been communicated to them

Premium
\$300.

and their consent to the sale obtained; and in case of the total loss of the vessel with salvage, the amount allowed out of the salvage to the officers and crew for wages earned or services rendered previously to the loss shall be considered as so much of the salvage applied to the use of the shipowners, even though the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss.

10th. It is also agreed that no assignment of this Policy shall be valid unless the written consent of the Insurers be first obtained and endorsed hereon. In all cases of return of premium, in whole or in part, ten per cent upon the return premium is to be retained by the Insurers. [15]

11th. And it is agreed that in the event of the insured failing or refusing to pay the premium, or any premium note when due, that it shall be at the option of the Company at any time thereafter upon written notice to the insured or his agent, to declare this Policy to be null and void; but the insured shall remain liable for such proportion of the premium or premium note as corresponds with the expired time at the date of such notice.

12th. It is furthermore Hereby Expressly Provided and Agreed that no suit or action against this Company for the recovery of any claim upon, under or by virtue of this Policy shall be sustained in any Court of Law or Chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall have occurred; said period of twelve months to commence

running from the time of such loss or damage, and not from the date when proofs of loss are made, or the amount of such loss or damage is ascertained, or any right of action under this Policy shall accrue; and in case any such suit or action shall be commenced against this Company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

13th. If there be an Agent of the Insurers located at or near any place where repairs are made, or proofs of loss or average taken, said Agent must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by this Company.

14th. In all cases of general average and/or salvage expenses, where the contributory value as stated in the adjustment, exceeds the value expressed in the policy, the liability of this Company shall be limited to the proportion which the amount insured bears to said contributory value.

(On margin.)

It is agreed that, if the vessel hereby insured shall come into collision with any other vessel, and the insured shall in consequence thereof become liable to pay, and shall pay any sums not exceeding the value of the vessel hereby insured, in respect of injury to such other vessel itself, or to the goods and effects on board thereof, or for loss of freight then

being earned upon such goods by such other vessel the insurers will pay the insured such proportion of three-fourths parts of said sums as the amount hereby insured bears to the value of the vessel hereby insured (but not exceeding in any event the amount of this policy). But this agreement is in no case to be construed as extending to any sums which the insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals, from any cause whatever.

Warranted not to carry coal or case oil from ports and/or places on the Atlantic Coast.

This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths (3/4) running down clause.

IN WITNESS WHEREOF, the FIREMAN'S FUND INSURANCE COMPANY has caused these presents to be signed by its duly authorized officers, in the city of San Francisco, State of California, this 17th day of April, One Thousand Nine Hundred and eleven.

WM. J. DUTTON,
President. [16]

RULES FOR ADJUSTMENT OF LOSSES

Under this Policy.

Rule I.

Metal and Metaling.

The following items shall be considered as chargeable to the Metaling:

1. The metal and nails.
2. The paper or felt; both at their cost, delivered

alongside or on board the vessel.

3. The labor of stripping off the old metal, and of punching and putting on the new, which is to be charged at the price actually paid therefor, when a separate bill for such labor can be procured. And in default of such separate voucher, the labor on the metal is to be estimated at the rate of thirteen (13) sheets of metal to the day's work, as charged for in the calker's bill of labor.

4. The cost of picking up the old metal and packing the same for sale.

Patching Metal.

5. Patching metal and calking under the same, when more than twenty (20) sheets are used, shall be adjusted in the same manner, so far as relates to the copper clause in the Policy, as when the whole bottom is stripped and re-metaled. When less than twenty sheets are used, the patching and calking under the same shall be placed in the vessel column, one-third off.

Rule II.

Docking and Calking.

The clause making the cost of docking and calking chargeable to Underwriters in the same ratio as re-metaling, shall be construed and defined to mean:

1. That when a vessel is docked or hove out solely for the purpose of remetaling (or, if on a single bottom, of recalking), all the expenses attending the docking or heaving out and calking, including materials used therefor, shall be charged to owners at the rate of two and one-half per cent per month for every month that the metal shall have been on the

vessel at the time when it is taken off, or, if on a single bottom, for every month intervening since she was last calked.

2. When a vessel is docked, or hove out for the two-fold purpose of remetaling, (or, if on a single bottom, re-calking) and repairing keel or bottom, by reason of having collided or stranded, then the expense of docking or heaving out shall be proportioned pro rata upon coppering and (or) calking and other repairs, in the proportion of the number of days' work expended upon each respectively. The above rules shall also apply to wharfage, but no wharfage shall be allowed for, except when indispensably necessary to the repairing of the vessel.

3. In default of a separate bill for calking, the labor of reefing out the old oakum, picking, spinning and putting in the new and pitching the seams, is to be estimated at three and one-half ($3\frac{1}{2}$) days' labor to the bale of oakum used, and the time occupied and material used in recalking under the metal, shall be estimated at one-half of the time and material required for recalking the whole vessel exclusive of decks.

4. The expenses attending the calking above the metal shall be adjusted less one-third for new.

5. The expense of navigating and towing the vessel to and from, and entering dock, including pilotage and wages and provisions of hands specially employed to navigate the vessel to and from the place of repair, shall follow the docking or heaving out as herein defined. But the wages and provisions of the regular crew of the vessel shall never be al-

lowed for in particular average. [17]

Rule III.

Commissions.

All commissions actually paid in a foreign or domestic port shall be chargeable as heretofore to the various interests adjusted upon. But no other commission shall be chargeable against insurers on disbursements in partial or salvage losses, nor in General Average, when ship and cargo belong to the same owners, nor in any other case when no such commissions have been actually paid, and when no charge therefor would be customary, or collectible in the ordinary course of the business of the insured, had no disaster occurred.

Rule IV.

Adjuster's Fees.

The Adjuster's fees in Particular Average, whether on vessel, cargo, or freight, shall be chargeable in the adjustment to the various interests adjusted upon, and shall be in proportion to the several amounts as apportioned therein.

Rule V.

Adjuster's Attitude.

The traditional and necessary attitude of an adjuster is that of a Referee and not that of an Attorney or Advocate. It is his duty, in all cases, to act with strict impartiality between insurers and insured, regardless of favor toward friend or employer, and intent solely upon the legal and clerical accuracy of his calculations. This rule shall be understood to be binding in cases of Particular Average, and in adjustments upon estimates for repairs, made with a

view to compromise, with the same force as in cases of General Average.

Rule VI.

Surveys.

The insurers shall not be obliged to accept any adjustment on a vessel based upon a survey which omits to discriminate between the repairs attributed only to the perils insured against, and such repairs as are due only to wear and tear, or to the original defects, natural decay, or depreciation of the vessel.

Rule VII.

Bills for Repairs.

When bills for repairs are presented, which include items indifferently specified chargeable partly to owners and partly to underwriters, and having no reference to discriminations in the survey, the adjuster shall require the claimant or master to separate the charges in accordance with the survey. Failing wherein, the adjuster shall refer the bill back to the maker thereof, with a request to separate the items, so as to correspond with the survey. Failing in both, it shall be the custom to charge the whole of the unspecified items to the "owner's" column. [18]

Rule VIII.

Special Charges on Cargo.

When sacrifices are made or expenses incurred for the benefit of all concerned in ship and cargo, and by reason of loss or condemnation of the ship, the cargo is the only interest saved to contribute, the proper proportion of such losses shall be paid by insurers on cargo, as General Average losses, though adjusted under the name of Special Charges on Cargo; and

notwithstanding that the goods may be insured "free of particular average."

Rule IX.

Appointment of Surveyors and Appraisers.

In all cases of Average, whether General or Particular, whether on Hull or Cargo, the selection and appointment of Surveyors and Appraisers shall be agreed upon beforehand by and between the insured or claimants in average or their representatives of the insurers on the other; and the services of the persons so appointed shall be understood to be wholly disinterested as between all parties concerned. No representative of underwriters shall be expected to certify, approve or accept any surveys or appraisements made in contravention of this rule; but such documents shall be deemed to be wholly *ex parte* in character, and, as such, open to criticism, or liable to be rejected altogether.

In no case shall any ship-carpenter, rigger, or other mechanic who may have served on a survey, be employed to make the repairs, or any portion thereof.

Rule X.

Payment of Losses.

All losses shall be payable sixty days after proof and adjustment of loss and proof of interest, and if payment be anticipated, interest shall always be discounted for the time so anticipated, at the current rate of interest at the time of payment. Provided, however, that General Average claims and losses of other descriptions, amounting to less than five hundred dollars (\$500), may be paid, without discount, so soon as ascertained; and nothing herein

contained shall apply to sums paid in compromise.

Rule XI.

Wages and Provisions in General Average.

The schedule of allowance for wages and provisions in General Average shall be fixed as follows:

Wages: The actual wages paid, at the prices specified upon the articles.

Provisions:

For Masters\$1.50 per day

For Mates 0.75 “ “

For Seamen and others..... 0.40 “ “

And the period for which wages and provisions shall be allowed, shall be from the day of bearing away for a port of distress, until the vessel is ready for sea.

[Indorsed]: Complaint. Filed in the U. S. District Court, Western Dist. of Washington, May 13, 1912. A. W. Engle, Clerk. By S., Deputy. [19]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Corporation,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Defendant.

Answer.

To the Honorable C. H. HANFORD, Judge of the
Above-entitled Court:

The answer of Fireman's Fund Insurance Company, a corporation, the above-named defendant, to the allegations of the complaint of the Globe Navigation Company, a corporation, the above-named plaintiff, admits, denies and alleges as follows:

I.

Defendant admits the allegations of paragraph 1 of the first cause of action.

II.

Defendant admits the allegations of paragraph 2 of said first cause of action.

III.

Defendant admits the allegations of paragraph 3 of said first cause of action. [20]

IV.

Answering unto the allegations of paragraph 4 of said first cause of action, defendant alleges that it has no actual knowledge in respect thereto, but admits that it has been informed that the incidents therein set forth actually occurred, and at the same time demands that strict proof be made thereof.

V.

Defendant admits the allegations of paragraph 5 of said first cause of action.

VI.

Defendant admits the allegations of paragraph 6 of said first cause of action, but denies that any grounds existed for the giving of said notice of abandonment, and alleges that said abandonment was

not accepted by defendant.

VII.

Defendant admits the allegations of paragraph 7 of said first cause of action.

VIII.

Defendant admits the allegations of paragraph 8 of said first cause of action.

IX.

Answering unto the allegations of paragraph 9 of said first cause of action, defendant admits that it was mutually agreed between the parties in interest, including the parties to this action, that said schooner should be relieved of the salvage claims of the said salvage libelants, together with the expenses necessarily incurred in said salvage proceedings, and admits that it has knowledge that the sum of Three Thousand Dollars (\$3,000) was paid the port of Portland for salvage claims of libelants, and that while it has been [21] informed that certain sums of money were paid by plaintiff on account of the other items set forth in said paragraph 9, defendant has no actual knowledge thereof, and for that reason denies the same, and demands that strict proof be made of each and every item therein contained. Defendant denies the remaining allegations of said paragraph.

X.

Defendant denies each and every of the allegations of paragraph 10 of said first cause of action.

XI.

Defendant has no knowledge or information as to

the truth of the allegations of paragraph 11 of said first cause of action, and for that reason, denies the same, and demands strict proof thereof.

XII.

Defendant denies each and every of the allegations of paragraph 12 of said first cause of action.

XIII.

Defendant admits that all and singular the premises are within the admiralty and maritime jurisdiction of this Honorable Court and that said defendant is within its jurisdiction, but denies that all and singular the premises are true.

I.

Defendant admits the allegations of paragraph 1 of the second cause of action contained in said complaint.

II.

Defendant admits the allegations of paragraph 2 of the said second cause of action. [22]

III.

Answering unto the allegations of paragraph 3 of said second cause of action, defendant reiterates its answers to paragraphs 4, 5, 6, 7, 8, 9, 10, 12 and 13 of said first cause of action, and hereby makes its said answers to said paragraphs, the denials, allegations and demands of proof therein contained, answers unto paragraph 3 of said second cause of action and to the paragraphs of said first cause of action repeated in and made a part of said paragraphs 3 of said second cause of action, with the same intent and purpose as if set forth at length herein.

Further answering unto the allegations of said complaint, defendant alleges:

I.

That while plaintiff served upon defendant the so-called notice of abandonment marked exhibit "B" and attached to said complaint, defendant then refused, and ever since has refused, to accept the said abandonment and that no sufficient grounds existed for abandoning said schr. "Wm. Nottingham" unto defendant, under the terms and conditions of said policies of insurance referred to in said complaint.

II.

Defendant admits that it will ultimately be liable, under its aforesaid policies of insurance for its proportion of general average and salvage charges accruing from the preservation of said vessel and cargo, but alleges that the amount thereof is unknown, and will not become known until an adjustment of the same has been stated, so that defendant is unable to make any tender unto plaintiff of the amount of such liability, if any amount is ultimately found to be due [23] and owing.

III.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE defendant prays that the action herein may be dismissed and that it may recover its

costs and disbursements herein incurred.

BALLINGER, BATTLE, HULBERT &
SHORTS,

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Attorneys for Defendant.

Postoffice address:

901 Alaska Building,
Seattle, Washington. [24]

State of Washington,

County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath,
deposes and says:

That he is the General Agent of the Fireman's
Fund Insurance Company for the State of Washing-
ton, and as such makes this verification for and on be-
half of said corporation; that he has read the forego-
ing answer; knows the contents thereof, and believes
the same to be true.

FRANK G. TAYLOR.

Subscribed and sworn to before me this 13 day of
June, 1912.

[Seal]

BRUCE C. SHORTS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of the within Answer and receipt of a copy
is hereby admitted this 13th day of June, 1912.

H. R. CLISE,
W. H. BOGLE,
Attorneys for Pltfs.

[Indorsed]: Answer. Filed in the U. S. Dis-
trict Court, Western Dist. of Washington. June 13,
1912. A. W. Engle, Clerk. By S., Deputy. [25]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Corporation,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Defendant.

Respondent's Bond.

KNOW ALL MEN BY THESE PRESENTS:
That the Fireman's Fund Insurance Company, a corporation, as principal, and the Southwestern Surety Insurance Company, a corporation, organized under the laws of the State of Oklahoma and authorized to do business in the State of Washington as surety therein, as surety, are held and firmly bound unto the United States of America, for the use of all persons who may be interested in the premises, in the sum of Two Hundred and Fifty (\$250.00) Dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of our successors, jointly and severally, firmly by these presents.

Signed and sealed at Seattle, Washington, this 13th day of June, 1912.

THE CONDITION of this obligation is such that, if the said Fireman's Fund Insurance Company, a corporation, respondent in the above-entitled action,

instituted in said court by the Globe Navigation Company, a corporation, against said [26] respondent, shall pay all costs which by the decree, mandate or practice of this court it may become liable to pay, then this obligation to become void and of no effect; otherwise, to remain in full force and virtue.

FIREMAN'S FUND INSURANCE COMPANY.

By FRANK G. TAYLOR,
Its General Agent.

SOUTHWESTERN SURETY INSURANCE COMPANY.

By E. LAMPING,
Its Resident Vice-President.

By S. ULVEN,
Resident Asst. Secretary.

[Indorsed]: Respondent's Bond. Filed in the U. S. District Court, Western Dist. of Washington. June 13, 1912. A. W. Engle, Clerk. By S., Deputy. [27]

**[Order Referring Cause to Commissioner for Taking
of Testimony, etc.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN ADMIRALTY—No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Plaintiff,

vs.

FIREMEN'S FUND INSURANCE COMPANY, a
Corporation,

Defendant.

ORDER OF REFERENCE.

The above-entitled cause in admiralty being at issue upon the libel or complaint of the Globe Navigation Company, a corporation, libelant, and the answer thereto of Firemen's Fund Insurance Company, a corporation, respondent,

Now upon motion of the proctors of record for the said respondent,

IT IS HEREBY ORDERED that the said cause be and it is hereby referred to the Hon. A. C. Bowman, Commissioner of the above-entitled court, for the taking of testimony; and it is further ordered that the libelant do have until July 23d, 1913, in which to introduce its direct evidence and testimony, and that the respondent shall have three full days thereafter in which to introduce its evidence and testimony; and

IT IS FURTHER ORDERED that the said commissioner report the testimony and evidence so taken, to this Court, on or before August 9th, 1913.

DONE in open court this 2d day of July, A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

We, the undersigned, proctors of record for libelant, do consent to the foregoing order.

H. R. CLISE and
W. H. BOGLE,
Proctors for Libelant.

O. K.—H. R. [28]

[Indorsed]: Order of Reference. Filed in the U. S. District Court, Western Dist. of Washington. July 2, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [29]

**[Stipulation re Deposition of William Cornfoot
et al.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2151.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Complainant,

vs.

FIREMEN'S FUND INSURANCE COMPANY, a
Corporation,

Defendant.

IT IS HEREBY STIPULATED, by and between H. R. Clise, Esq., Proctor for Libellant, and Ira A. Campbell, Esq., Proctor for Respondent, that the depositions of WILLIAM CORNFOOT and ROBERT McINTOSH, may be taken before Alva W. Person, a Notary Public for the State of Oregon, in the City of Portland, on this first day of August, 1913, without the issuance of a formal commission for the taking of the same; that the testimony of said witnesses may be taken in shorthand by said Notary and thereafter reduced to typewriting and the signatures of the witnesses to said depositions may be waived; that said depositions may be offered in evidence in said case by either party to this stipulation, without objection to the form or manner or time of taking the same.

Mr. CLISE.—In so far as the testimony about to be taken relates to an adjustment as a partial loss for labor and material, I object as incompetent, irrelevant and immaterial and not competent under the policies of insurance mentioned in complainant's [30] complaint and upon which the complainant's action is founded. And it is understood that this objection may apply to all such testimony, without any specific objections being taken to particular questions.

Mr. CAMPBELL.—Yes, that is agreed to. To clear my own mind upon that, Mr. Clise, I understand that your position on the question of law is that the provisions of clause nine of the policy do not apply?

Mr. CLISE.—Yes, that is my contention.

Mr. CAMPBELL.—That is, clauses eight and nine.

Mr. CLISE.—Yes, clauses eight and nine.

Mr. CAMPBELL.—I think there are certain clauses on the back of the policy, too.

Mr. CLISE.—Yes; and it may be such other clauses as relate to adjustment or partial loss.

Mr. CAMPBELL.—Yes. I will call Mr. Cornfoot.

[Deposition of William Cornfoot, for Respondent.]

WILLIAM CORNFOOT was thereupon produced as a witness on behalf of the respondent, and, having been first sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. How old are you, Mr. Cornfoot?

A. I am forty-six.

Q. Where do you reside?

A. 336 Martin street, Portland, Oregon.

Q. What business are you engaged in?

A. Machine shop and general repair work. [31]

Q. Are you the proprietor of any engineering company in this city? A. I am.

Q. Of what one?

A. Albina Engine & Machine Works.

Q. Are you a marine engineer? A. I am.

Q. What experience have you had as a marine engineer?

A. Well, in ship experience I served my apprenticeship amongst marine engines, and I sailed the seas as junior engineer for six years, chief en-

(Deposition of William Cornfoot.)

gineer for eight years and a half—five years junior; thirteen years and a half altogether.

Q. Of what class of ships were you chief engineer?

A. Foreign going, British ships.

Q. Of what size?

A. The last ship I was chief engineer of was the Steamship "Adato." She carried five thousand five hundred approximately, cargo.

Q. Tons? A. Yes.

Q. Did she ply out of the Port of Portland at one time? Did she run out of the Port of Portland at one time?

A. Yes, she ran out of here about two years, voyage after voyage.

Q. To the Orient?

A. To the Orient, Manila, Hong Kong; different ports in China.

Q. How long have you been engaged in the engine and machine works business?

A. In business nine years.

Q. At what place? A. In Portland, Oregon.

Q. What character of a plant has the Albina Engine & Machine Works? [32]

A. First-class repairing plant, up to date in every respect.

Q. Was the Albina Engine & Machine Works a bidder for the repairs of the schooner "Nottingham"? A. Yes, sir.

Q. At the time she came into the Port of Astoria and the Port of Portland after her trouble in October, 1911?

(Deposition of William Cornfoot.)

A. Yes, in December, anyhow, 1911, or January, 1912.

Q. Who, representing the Albina Engine & Machine Works, put in the bid for the repairs?

A. William Cornfoot.

Q. Yourself? A. Yes.

Q. Upon what was that bid based?

A. On practical knowledge of the work.

Q. Yes, but for what work was the bid?

A. For the whole work, repairing of the ship to put her in a seaworthy condition.

Q. What did you have, if anything, advising you as to the work which was to be done?

A. What did I have?

Q. Yes. From what did you obtain your knowledge as to the required work of repair?

A. Well, by inspection of the work and personal knowledge of the character of the work, by Mr. McIntosh's knowledge as carpenter, and several visits down to the ship, and talks with Captain Swenson.

Q. Where did he furnish them to you?

A. Brown & McCabe's office, stevedores.

Q. In the city of Portland?

A. In the city of Portland, Second and Ash streets.

[33]

Q. Have you the specifications here?

A. I don't have them with me personally now.

Mr. CAMPBELL.—Have you got them, Mr. McIntosh?

Mr. ROBT. McINTOSH.—They are here; yes.

(Deposition of William Cornfoot.)

That is the original copy of the specifications (producing papers).

Mr. CAMPBELL.—Mr. Thorndyke's signature appears at the close, before the last. (Mr. Campbell passed said paper to Mr. Clise.)

Mr. CLISE.—Are you going to offer them in evidence?

Mr. CAMPBELL.—May we take this until the close of this litigation?

Mr. ROBT. McINTOSH.—You can.

Mr. CAMPBELL.—I should like to offer the specifications in evidence.

Thereupon said paper was marked Cornfoot Exhibit 1, and is attached to this deposition as a part of the same.

Q. What was the amount of your bid that you made to the Globe Navigation Company to do the work called for by the specifications?

Mr. CLISE.—I will object as not the best evidence.

A. Twenty thousand nine hundred and fifty dollars.

Q. Did you make that bid in writing or orally?

A. In writing.

Q. To whom was it given?

A. I think Mr. McIntosh presented that bid. I wasn't at the opening of the bids on that day.

Q. Now, Mr. Cornfoot, what experience have you had in the repair of vessels?

A. I don't know. I have been raised amongst vessels all my life. [34]

(Deposition of William Cornfoot.)

Q. Have you at any time done any repair on other vessels?

A. Yes; I have done all sorts of repairs. I think I have got a record of two or three hundred ships that I have repaired at different times and in different ways.

Q. Name me some of the vessels on which you have done work within recent years.

A. Well, I have done all the Dollar Line's work for the last eight years, every ship that comes to port.

Q. What character of vessels does the Dollar Line have? A. Steamers.

Q. Is that the Dollar Steamship Company of San Francisco?

A. The Dollar Steamship Company of San Francisco.

Q. On what of their vessels do you remember having done work?

A. Well, I have done work on the "Hazel Dollar," "Bessie Dollar," "Stanley Dollar," "Robert Dollar."

Q. What types of vessels are the "Robert Dollar," the "Hazel Dollar" and the "Bessie Dollar"?

A. Modern steam vessels.

Q. About what tonnage are they?

A. Ships carrying about six thousand or seven thousand tons.

Q. Have you ever done any work for the United States Government? A. I have.

Q. What character of work?

(Deposition of William Cornfoot.)

A. General repair work and engine repairs, deck repairs, putting plates on ships' sides.

Q. For what departments of the Federal Government have you done such work?

A. I have done work for the engineer's department, for the quartermaster's department, the Light-House Service.

Q. What vessels of the Light-House Service have you ever done any [35] work on?

A. "Light Vessel No. 88"; the Light-house Tender "Columbine."

Q. Do you remember the amount of work that was done on the "Columbine"?

A. It was about a ten thousand dollar job, ten or eleven thousand.

Q. Did anyone join with you in doing the Government work on the "Columbine"? A. Yes, sir.

Q. Who was it? A. Mr. McIntosh.

Q. Robert McIntosh? A. Robert McIntosh.

Q. Did anyone combine with you and do the work on the "Lightship No. 88"? A. Yes, sir.

Q. Who was it? A. Robert McIntosh.

Q. Was that work done under bids?

A. Under bids.

Q. In whose name were the bids put in?

A. By the Albina Engine & Machine Works.

Q. Who stood financially responsible for the work? A. William Cornfoot.

Q. Who? A. I did.

Q. When you say I, do you mean—

A. (Interrupting.) William Cornfoot, yes, sir.

(Deposition of William Cornfoot.)

Q. (Continuing.) — the Albina Engine Works?
[36]

A. Well, I am the proprietor of the Albina Engine & Machine Works, sole proprietor; so that I was solely responsible.

Q. You are the sole owner of the Albina Engine & Machine Works? A. I am the sole owner.

Q. Did you ever do any work on the "San Jacinto"? A. Yes, sir.

Q. What was the character of that work?

A. Well, she came in here in a half sinking condition, water-logged; her bottom was practically torn out. She was replanked and repaired completely, fore and aft, both sides, and the engine works; there was a new tail shaft put in her and the engines were overhauled and everything adjusted and repaired.

Q. What type of vessel is the "San Jacinto"?

A. Just an ordinary steam schooner.

Q. Engaged in the lumber trade on the Coast?

A. Yes.

Q. Was she wood or a steel vessel?

A. She is a wooden vessel.

Q. Did anybody join with you in doing that work?

A. Yes, sir.

Q. Who was it? A. Robert McIntosh.

Q. What part of the work did Mr. McIntosh do?

A. He did all the woodwork.

Q. What did that include?

A. That practically included a new bottom, beams and knees.

(Deposition of William Cornfoot.)

Q. How large a job was that?

A. You mean in money?

Q. Yes.

A. Somewhere about twelve thousand dollars.

[37]

Q. In whose name was that bid rendered?

A. Well, it was individual, as far as that goes; but I had been doing work for the Wood Lumber people for quite a while. Captain Hansen was in charge of the "San Jacinto" when she arrived here, and he wished me to do the work and I got Mr. McIntosh to do the woodwork. He had it in his own name and I had the iron work in my own name.

Q. When you speak of the Wood Lumber Company, what company is that? What is the full name? A. E. H.

Q. E. K.?

A. Or E. K. I have been doing their repairs for the last seven or eight years.

Q. Do you recall the ship "Acme"? A. I do.

Q. Did you ever do any work on her?

A. Yes, sir.

Q. In what condition did she come into the Port of Portland?

A. She came dismasted, top mast gone and upper yards lost.

Q. Do you remember the amount of that job?

A. About twenty-two thousand dollars.

Q. What was the nature of the repairs you put on that vessel?

A. New yards and rigging. Of course, that neces-

(Deposition of William Cornfoot.)

sitated all the new bands, and things of that kind, on the yards.

Q. Incident to the repair of a dismasted ship?

A. Yes; yes; besides other small repairs, such as the runway bridge there, fore and aft. That was all broken. And the hand rail all broken up, and other repairs to the chain gear, wash boards, and such as that on ship's side, and bulwarks.

Q. How long have you known Robert McIntosh?

[38] A. Ten years.

Q. What is his general reputation for responsibility and character of work?

A. His reputation, so far as I know it, is that he is about the best general knowledge man in this town as a carpenter in the ship repair work, and I find him so.

Q. What has been your experience with Mr. McIntosh as to his responsibility in doing work and carrying out work? A. Been friendly.

Q. What has been your experience with the character of work that he has done?

A. It has always been done satisfactorily, and everything has been satisfactory to everybody. I haven't had any complaints, or anything of that kind, any work that has been in my name while he was working in conjunction with me.

Q. Have you any knowledge of Mr. McIntosh ever having fallen down on any job of ship repair work?

A. I have not.

Q. Did you know anything about the repair of the steamer "Elder"?

(Deposition of William Cornfoot.)

A. Slightly. I did some work on it.

Q. Do you know whether Mr. McIntosh had anything to do with the repair of that vessel?

A. Mr. McIntosh, at that time, was superintendent of the Port of Portland Drydock, on which dock she was repaired.

Q. Do you know whether he had active charge of any of her repair work?

A. No, sir, he had none. I can vouch for that.

Q. In making this bid to the Globe Navigation Company in the name of the Albina Engine & Machine Works, was it your intention or not your intention, to stand behind the responsibility of Mr. McIntosh. [39]

Mr. CLISE.—I object as incompetent, irrelevant and immaterial.

A. It certainly was my intention.

Q. At the time that the bid was made to the Globe Navigation Company, did you make any arrangements with a surety bonding company for the furnishing of the bond required by the specifications?

A. I did.

Q. With what company?

A. McCargar, Bates & Lively, in the Yeon Building, Portland, Oregon.

Q. Do you know what bonding company they represented?

A. The Aetna, I understood. They have my accident policies there, and it is in that company and I take it for granted that it was the same company. I don't know. They were responsible.

(Deposition of William Cornfoot.)

Q. In doing the repair work on these other vessels that you have named under bids, were you ever required to furnish bonds? A. Yes, sir.

Q. In doing the work for the Government were you required to furnish bonds? A. Yes, sir.

Q. Will you state whether or not you ever had any difficulty in procuring bonds from the bonding companies to guarantee your bids?

Mr. CLISE.—I object as incompetent, irrelevant and immaterial.

A. No, sir.

Q. Did you obtain any letter or document from the agents of the surety company which was delivered to the Globe Navigation Company respecting the issuance of a bond on the bid?

A. That was enclosed in the same envelope with the bid; yes, sir.

Q. Did you deliver that personally? [40]

A. No, sir; I delivered it to Mr. McIntosh and he delivered it personally.

Q. Was that letter ever returned to you?

A. No.

Q. I will hand you a letter and ask you what it is.

A. That is a copy of the letter that I had from McCargar, Bates & Lively in connection with the bond for the repairs on the "William Nottingham."

Mr. CAMPBELL.—I should like to offer this letter in evidence. If the original copy is in existence and in the possession of the Globe Navigation Company, we, of course, prefer to have that and introduce that in the record instead of the copy. If it

(Deposition of William Cornfoot.)

is necessary, I will call the agents of the surety company, if you people require it.

Mr. CLISE.—I won't object upon that ground. I will object upon the ground, at the present time, that this is not the best evidence, and I think that is the only objection; and incompetent, irrelevant and immaterial. And I am perfectly willing that you shall make your correction, if you wish, of that date at this time.

Mr. CAMPBELL.—Yes. That is, the copy of the letter is dated January 12, 1913, and it should be January 12, 1912, the difference between 1912 and 1913 being a typographical error.

Mr. CLISE.—Yes.

Mr. CAMPBELL.—And I will make the correction by putting the figure "2" above the "3" and drawing a line through the "3." We will ask for the production of the original letter, and I will offer this copy in evidence.

Thereupon said paper was marked Cornfoot Exhibit 2, and is attached to this deposition as a part of the same. [41]

Mr. CLISE.—Now, I wish you would read that last question where Mr. Cornfoot says what he did with that letter.

Thereupon the reporter read the following question and answer, to wit:

"Q. Did you deliver that personally?

"A. No, sir; I delivered it to Mr. McIntosh and he delivered it personally."

Mr. CLISE.—I move that so much of the reply

(Deposition of William Cornfoot.)

of Mr. Cornfoot as says what Mr. McIntosh did with the letter, be stricken as mere hearsay.

Mr. CAMPBELL.—I consent to that, and we will supplement the proof on the delivery of that letter by Mr. McIntosh's testimony.

Q. Did you have anything to do with the repair of the French ship "Asie"? A. No, sir.

Q. Did you recall that vessel being under repair in this report? A. No. I wasn't here then.

Q. Mr. Cornfoot, referring to your bids, I will ask you how much was included in your bid of twenty thousand nine hundred and fifty dollars for the stores of a consumable nature which were required to be furnished by the terms and conditions of the specifications on which the bid was based?

A. Cabin and crew stores, fifteen hundred dollars.

Q. Now, will you state whether or not those are stores of a consumable nature?

A. Yes. That was principally food stores and things pertaining to the galley.

Q. Will you state whether or not that included paints and oils? A. No.

Q. I will hand you the specifications, marked Cornfoot Exhibit 1, [42] and call your attention to the last two sheets, designated "List of stores required to replace those lost or damaged 'Wm. Nottingham' disaster, October, 1911," and ask you what part of those stores were covered by the fifteen hundred dollars which you just mentioned.

A. None; none of these. Oh, I beg your pardon; I spoke too quickly. These subsistence stores and

(Deposition of William Cornfoot.)

sundry items; these subsistence stores and these sundry items on the last page.

Q. Were included in the fifteen hundred dollars?

A. Yes.

Q. What about the slop chest?

A. Well, there was a thousand dollars to take care of cabin furniture and things of that kind, but this division of the stores I am not altogether sure of just at the present moment. Excuse me for looking back another page.

Q. Yes; go ahead.

A. I haven't seen these specifications since that time. I know I allowed twenty-five hundred dollars to cover all stores, and there was a thousand dollars for furniture and things pertaining to the ship, and these items, chandlery stores and perishable goods I allowed fifteen hundred dollars for.

Q. Now, to get this clear, your total allowance for all supplies to the ship, including cabin fittings, was how much?

A. Including fittings, twenty-five hundred dollars.

Q. And in the fifteen hundred dollars do I understand you to testify that you included the subsistence stores and sundry items, specified on the last two pages of the specifications?

A. Yes. I might—

Q. And what do you say about the chandlery stores?

A. I was going to say, I might have also included some of these [43] items in the other list there.

(Deposition of William Cornfoot.)

I could not give you item for item, now, on that point.

Q. Can you verify your recollection on that later?

A. Well, there was hose and hose connections. I might be able to do so, but I am afraid not. I unfortunately have destroyed most of my notes in my figuring up of this job. The people that I figured with, possibly, have done the same thing.

Q. What did you include in the one thousand dollars that you speak of as ship's furniture?

A. Well, there was bedding and there was chairs, and the cabin was all nicely done up and that had been all destroyed, and knickknacks and things of that kind.

Q. Were those matters called to be supplied by these specifications?

A. Had to be put into condition the same as it had been.

Q. And you say you allowed a thousand dollars for those items?

A. Yes, sir, the furniture and fixtures.

Q. If the chandlery stores and the slop chest were not included in the allowance of twenty-five hundred dollars under your bid as covering stores and supplies, under what other portion of the bid would they have been included?

Mr. CLISE.—I object to the question, upon the ground that the witness has testified that they were included therein, and that the question is leading and suggestive.

Mr. CAMPBELL.—I didn't understand clearly

(Deposition of William Cornfoot.)

that he had testified.

Q. Then I understand the twenty-five hundred dollars included all stores and—

A. (Interrupting.) All stores and fixtures.

Q. (Continuing.) All stores and supplies and cabin fixtures? [44] A. Yes.

Q. And cabin fixtures and furniture and fittings you estimated at one thousand dollars? A. Yes.

Mr. CAMPBELL.—That is all with Mr. Cornfoot.

Cross-examination by Mr. CLISE.

Q. Mr. Cornfoot, if I understand, you are a sole trader doing business under the name of the Albina Engine & Machine Works? A. Yes, sir.

Q. And you were, in January, 1912?

A. Yes, sir.

Q. That was about the time you commenced business?

A. Oh, no. I have been in business for ten years.

Q. Under that same name?

A. Nine years in Portland.

Q. Under that same name?

A. Well, I did business under my own personal name for about three years. Then I formed the Albina Engine & Machine Works.

Q. Since that time?

A. That is about six years ago.

Q. Now, I understand your works are principally relating to engines and steel work and iron work, and matters of that kind?

A. General repair work of all kinds.

Q. Including wood work?

(Deposition of William Cornfoot.)

A. No, I dont touch wood work personally.

Q. No; that you always place in the hands of someone else? A. Yes.

Q. Generally Mr. McIntosh? A. Yes. [45]

Q. Now, how did you come to put in this bid on this work. How was the matter called to your attention?

A. There was bids called for, and I had a copy—I got a copy of the specifications and bid on them.

Q. How did you happen to get that? How was the matter called to your attention?

A. Well, I knew the ship was to be repaired, and I was around to get a copy of the specifications, and I met Captain Swensen and I got a copy of the specifications from Captain Swensen.

Q. Did Captain Crowe ever talk to you with regard to this? A. No, sir.

Q. Now, do you think that you handed this bid to Mr. McIntosh, or did you hand it to Mr. Thorndyke yourself? A. I gave it to Mr. McIntosh.

Q. Did you have some conversation with Mr. Thorndyke on or about the time the bid was presented?

A. I met Mr. Thorndyke that afternoon after the bids had been opened.

Q. And that was the time when you told him that Mr. McIntosh would do the woodwork and that you would only look after what small amount of iron work there might be? A. Small work?

Q. Yes.

A. Mr. McIntosh was right with me; yes.

(Deposition of William Cornfoot.)

Q. Yes, but that is the time when you made this statement to him? A. Yes.

Q. Now, the Dollar steamers are steel steamers, are they not? A. Yes.

Q. And so are the Government boats all steel vessels? A. Yes, principally. [46]

Q. Yes; all the Government boats that you mentioned were steel boats, were they not?

A. Yes. I have also done work on the "Orago." She is a wooden vessel. Also on the "George H. Mandell." She is a wooden vessel.

Q. When did you do work on those two boats?

A. This year.

Q. This year?

A. Yes. I riveted the schooner "Minnie E. Kelton" here. That is an old one, anyway; that is an old shell; last year.

Q. Last year. That is, since January, 1912?

A. Yes. Last year I did that.

Q. Now, the "San Jacinto," that is a steamer, too, is it? A. Yes.

Q. And the work that you did yourself, I suppose related to the engines?

A. Engines and boilers and machinery.

Q. And machinery; yes. What kind of a ship is the "Acme"? A. The "Acme" is a steel ship.

Mr. CLISE.—That is all.

Redirect Examination by Mr. CAMPBELL.

Q. Did Mr. McIntosh join you on any part of the work on the "Minnie E. Kelton" or "Mandell"?

(Deposition of William Cornfoot.)

A. No; that was done by Supple under a separate bid.

Q. Under a separate bid? A. Yes.

Q. What was the "Mandell," what type of vessel?

A. She is a wooden vessel. I simply changed her wheel. I suppose that is not pertaining to wood-work. [47]

Q. Did you have any conversation with Mr. Thorndyke at the time that you met him?

A. Yes, I had a small conversation with him that afternoon.

Q. State what that conversation was.

A. Well, I could not say it word for word, but I met Mr. Thorndyke up in the Oregon Hotel and Mr. McIntosh introduced me as Mr. Cornfoot, the proprietor of the Albina Engine & Machine Works, and that our bid had been the lowest, and Mr. Thorndyke said to me that our bid would receive proper—now, what was the word?—that it would be properly considered; that was it; and that he thought that we would do the work. That remark was also passed at the time.

Q. Did Mr. Thorndyke make any objection to Mr. McIntosh joining with you in the work under your bid? A. No, sir.

Q. How did you obtain the values on the stores and furniture and fittings?

A. Well, I put in quite a bit of time going around here for to get prices on them and these cabin stores, table goods and things. I got a price from them people down here, Wadhams-Kerr, on them, and on the

(Deposition of William Cornfoot.)

other, furniture and things of that kind, the dishes, I went to Meier & Frank's, and I went to M. Sellers & Company and got prices from them on the different articles.

Q. Are these firms you mention Portland firms?

A. Yes, sir.

Q. Did you ever have any subsequent conversation with anyone connected with the Globe Navigation Company, following your interview with Mr. Thorn-dyke?

A. Not except Captain Swenson; I met him once or twice. [48]

Q. Any conversation ever passed between you?

A. No, not very much particular conversation; only just wondering why the job wasn't awarded; that is all.

Mr. CAMPBELL.—That is all.

WITNESS.—Perhaps I made a mistake about the "Orago" being one of the vessels; I have worked on so many.

Mr. CAMPBELL.—You say that you made a mistake about the name of the "Orago"? A. Yes.

Q. If it was not the "Orago," what vessel was it?

A. Well, I don't know. I have done work on so many of them, I am kind of mixed up.

Q. Have you ever fallen down on any job of repairs that you have undertaken?

A. No, I don't think so. I never had any fights or disputes, or anything of that kind.

AND FURTHER DEPONENT SAITH NOT.

Signature waived. [49]

[**Deposition of Robert McIntosh, for Respondent.**]

ROBERT McINTOSH was thereupon produced as a witness on behalf of the respondent, and, having been first sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. How old are you, Mr. McIntosh?

A. Fifty-eight.

Q. Where do you live?

A. 980 Savier Street, Portland.

Q. What is your business?

A. Ship carpenter, contractor, calker, rigger.

Q. How long have you been engaged in the business of ship repairing? A. Thirty years.

Q. How long have you been in that business in the port of Portland? A. All the time; thirty years.

Q. Did you have anything to do—

A. (Interrupting.) No; excuse me. I was superintendent of the Port of Portland Drydock for five and a half years out of that time.

Q. What do you mean by saying that you were superintendent of the Port of Portland Drydock?

A. I was appointed by the Port of Portland Commission to take charge of the dock, and I was sent to New York to see how they arranged things there and came back and when the dock was finished, I took charge of it, docked the first ship that was ever put in it and run it for five years and a half under my superintendence and charge entirely. [50]

Q. Who had charge of it?

(Deposition of Robert McIntosh.)

A. No manager. I was the managing superintendent.

Q. Yes. Who had charge of the construction of the dock?

A. It was constructed by a contractor named Wakefield.

Q. Have you ever repaired any vessels?

A. Yes, sir, a good many.

Q. Have you ever repaired any vessels which required a repair similar in character to that which you proposed to put on the steamer "Wm. Nottingham" under the specifications on which the Albina Engine & Machine Works' bid was made?

A. Yes, sir.

Q. How many vessels approximately would you say that you had repaired during your experience in the Port of Portland?

A. That is on the drydock, you mean?

Q. No. A. Oh, all the time?

Q. All the time while you have been in the ship repairing business in Portland.

A. Oh, my gracious! I don't know. Five hundred. That is an approximate estimate. More than that, but that is enough.

Q. It has been testified in this case, as I recall the testimony, that you fell down, or words to that effect, on the repair of the steamer "Elder." Will you state whether or not that was true?

A. I had nothing to do with the "Elder." I was superintendent of the drydock. I had nothing in the world to do with the "Elder," only docking her. I

(Deposition of Robert McIntosh.)

got a present of a diamond pin from the owner for docking her in such a satisfactory manner, without injuring her.

Q. Where did the "Elder" get into trouble which afterwards necessitated her being docked? [51]

A. She went ashore on a rock down close to Globe, about thirty-five or forty miles down the river here, going down, bound for San Francisco.

Q. Was she afterwards raised?

A. She was raised; yes.

Q. And where was she taken for repair?

A. The Port of Portland Drydock.

Q. At St. Johns? A. At St. Johns; yes.

Q. What did you have to do with her at the Port of Portland?

A. I had to get her in shape, keep her in line, see that she didn't break any worse than she was, shore her up, arrange the keel and bilge blocks in such a manner that it would take an equal strain all over, because she was broken.

Q. What was that incident to, the repair or docking the vessel? A. Incident to the docking only.

Q. What was the condition of the "Elder" when you docked her?

A. There was a hole in her fifty feet long and eight feet high; from one part of the keel forward fifty feet aft was bent in a circle eight feet six inches high, twelve feet from the bottom of the dock; and her starboard plates were gone for that fifty feet up to above the turn of the bilge on the port side—on the starboard side. The port was something similar.

(Deposition of Robert McIntosh.)

The forefoot was gone. Aft hull was intact.

Q. What can you say as to the nature of the task in docking that vessel?

A. It was a difficult task; a very great deal of judgment required in doing it without hurting the ship and then bringing a suit for damages against the dock if she wasn't docked properly. I was responsible for that [52]

Q. Do you know of any complaint having been made as to the way the work of docking was done by you? A. No, sir.

Q. Was any recognition made to you by the owners of the "Elder" for the work that was done?

A. Yes, sir.

Q. In what way?

A. He gave me a present of a diamond pin on the seventh day of July, after the vessel was docked, my birthday.

Q. Have you ever, so to speak, fallen down on a job of repairs in the Port of Portland?

A. No, sir. In the dock, you mean?

Q. Not on the dock, but in repairing vessels.

A. When you say Port of Portland you mean Portland?

Q. Yes; I don't mean under the Commission.

A. When you say Port of Portland that means the Commission of the Port of Portland. Just say Portland, and then I will understand you better.

Q. All right.

A. Then I had some trouble with the "Shna-Yak."

Q. What type of vessel was she?

(Deposition of Robert McIntosh.)

A. She was a steam schooner, wooden vessel.

Q. What was the trouble with her?

A. She had been ashore somewhere onto a bar, or somewhere; I don't know where. Part of her keel was gone and her forefoot was partly damaged. She was pretty badly strained around the engine-room and aft. I don't think there was anything the matter with the rudder. We calked her and put a new piece of keel on her, a piece fore and aft, and refastened her aft around the pointers, stringers and breast-plates. [53]

Q. In what respect did you have difficulty with that piece of work?

A. There was very little financial trouble there. I had a partner who failed to keep up his end. He was to produce half of the money, and he failed to do it, so I threwed the thing onto the hands of the insurance people. The Captain then paid up all the bills and had a balance of one hundred and twelve dollars left when I was through; so there was no financial difficulty about it any more than that. To get rid of my partner I done so.

Q. Was any complaint made to you about the character of the work that you did upon her?

A. No, sir. After she was undocked, it was found she was leaking, and we put her back in the dock again, and fixed the leak, which happens frequently. No complaint about the work, not a particle.

Q. Did you ever have any other trouble in the character of the work, or completing a job which you undertook as a ship repairer in Portland?

(Deposition of Robert McIntosh.)

A. Never; never, sir.

Q. Or any other place? A. No, sir.

Q. Either financially, or—

A. (Interrupting.) Financially, or any other way.

Q. Or by reason of the nature of the work?

A. No, not any.

Q. Will you give me the names of some of the vessels on which you did work similar to the character of repair work required on the “Nottingham,” which you were to perform?

A. Lately the job that came most near like that was the French ship “Asie,” which had three masts knocked out. She was a four-masted [54] ship. Three of them was knocked out. That was a steel vessel. And of the “Tillie E. Starbuck.”

Q. What was the nature of the work that you did on the “Asie”?

A. Rigged her; rerigged her, and done all the carpenter work that was damaged; calked her decks, put new ceiling in her, and otherwise done all the general work about her; whatever necessary furniture and linoleum and similar to these specifications here, stores and all that kind of thing, eggs and wine and tobacco and everything.

Q. How much did that job amount to, in dollars and cents?

A. The contract price was thirty-two thousand dollars, and the calking of the deck wasn't included in that price; and the ceiling wasn't, the new ceiling wasn't included. It amounted to about forty-eight thousand dollars altogether.

(Deposition of Robert McIntosh.)

Q. Did you have any difficulty in making or completing that job? A. No, sir, not a particle.

Q. Was any complaint made?

A. Not a complaint. The best ship ever went out of Portland. A new ship, the captain said; a new ship.

Q. Now, you mentioned the "Tillie E. Starbuck." What was the work done on her?

A. You see, I made the spars for the "Tillie E. Starbuck," duplicated them three times, all the spars on the "Tillie E. Starbuck,"—all but the lower masts.

Mr. CLISE.—Is she wood or iron?

Q. (Mr. CAMPBELL.) She was a steel vessel, wasn't she?

A. Yes. I put new spars in the "Olive S. Southerd," a wooden ship.

Q. Wait until we finish with the "Starbuck." Wherein was the character of the work which you did on the "Asie" different from the work which you would have done on the "Nottingham" under your bid? [55]

A. The only difference would be in outside calking. That would be the only difference, nothing more or less; and the woodwork on the keel, whatever I was to do there, That was the only difference.

Q. How did the replacing of the masts and the re-rigging and furnishing of sails to the "Asie" differ from that which would have been required on the "Nottingham"?

A. Nothing whatever, only the rigging of the "Asie" would be heavier; that would be all; larger in

(Deposition of Robert McIntosh.)

diameter, larger sails, and so forth, and wire rigging.

Q. What was the next vessel you mentioned?

A. "Olive S. Southerd."

Q. What character of vessel was she?

A. A wooden vessel, American vessel.

Q. How many masts?

A. Three masts, bark-rigged.

Q. What was the damage to her?

A. Broken mainmast.

Q. What work did you do on her?

A. Put a new mainmast in her, calked her topsides, calked her deck. There was no drydock here then.

Q. Wherein was the work of refitting and re-rigging her mast different from that of the "Nottingham"?

A. More of it, because she was square rigged. She had six yards in the mast, where this one had none—or five yards, rather, on the mast.

Q. What other vessels have you repaired?

A. Similar to that?

Q. Was the "Southerd" a wooden vessel?

A. A wooden vessel. Yes. I am picking out wooden vessels now [56] for you.

Q. All right.

A. "Indiana"; "Sea King"; I am giving wooden vessels now, so it will be correct; and I don't know any more just now; I can't think of them all.

Q. What was the nature of the repairs?

A. Rigging and spars and calking. Those are all wooden vessels.

(Deposition of Robert McIntosh.)

Q. Were they dismasted vessels also?

A. Partly.

Q. What other style vessels have you repaired, on which the rigging was similar to that required on the "Nottingham"?

A. Last January Mr. Cornfoot and I repaired the bark "Inverclyde," a steel vessel; took the bowsprit out, and put it back again after rebuilding it. That is the latest. The "Roanoke," a steel vessel; I took the foremast out of her and put a new one in. She is a steel vessel, local vessel.

Q. That is a steamship? A. Yes, a steamship.

Q. Do you recall any others now?

A. Rigging jobs? No; I can't recall any. I think that is enough. Isn't that plenty, or do you want some more?

Q. No. We want to qualify you.

A. Well, I think I am qualified now.

Q. Mr. Cornfoot mentioned your having joined with him in the repairs of the "San Jacinto"?

A. Yes, sir. Well, that was a separate job. He done the engine work and I made a contract direct with Mr. Thayer for the wood part of the work; Mr. Thayer, the managing owner of the E. K. Wood Lumber Company.

Q. Does Mr. Thayer live in San Francisco? [57]

A. Yes.

Q. What was the nature of the work that you did on the "San Jacinto"?

A. New keel the whole length of her, all new plank on both sides up to the nine or ten-foot mark, new

(Deposition of Robert McIntosh.)

rudder-post, new stern-post, new rudder, a new fore foot; calked her; generally new all over from bilge down; new frames.

Q. Do you know whether or not the E. K. Wood Lumber Company is the owner of other vessels?

A. Yes; they own several vessels. I don't know the names of them.

Q. What has been the nature of the work that you have done with Mr. Cornfoot on the Government vessels?

A. We done the work on the Government vessels, on the "Columbine," "Number Eighty-eight Lightship," and I forget the number of the other one. We done work on three lightships altogether.

Q. Ninety-seven?

A. Ninety-seven, was it? We done work on three lightships, I think; the "Columbine" and the "James Fornance"—

Q. How do you spell that? A. F-o-r-n-a-n-c-e.

Q. What is she, wooden or steel vessel?

A. She is steel.

Q. What has been the nature of the work you have done on those vessels?

A. Carpenter work around the deck and engine-room, bulkhead, doors, and things of that kind, and cleaned the bottoms and painted them. Lightship work, I repaired number fifty myself. She was a composite built vessel. I repaired her several times; [58] new planking and sheathed her over one time from the water up to the gunwale; altered her state-rooms. She is now a relief ship. She is not on the

(Deposition of Robert McIntosh.)

station any more.

Q. A lightship, is she?

A. Yes. I fell down on that job. They had to take her off of the beach. The company took her off and failed, lost ten thousand dollars; but the Government didn't lose anything. There was no cure, no pay.

Q. Where was she beached?

A. McKinzie Head, three miles north of Cape Disappointment.

Q. At the entrance to Columbia River?

A. Yes, sir.

Q. On what kind of beach?

A. Sand beach and several rocks on it; but she was in a sandy beach.

Q. Was her position exposed or sheltered?

A. Exposed.

Q. Exposed to what waters?

A. To the current westerly, southwest winds.

Q. Of what waters? A. The Pacific Ocean.

Q. Have you had any experience in repairing the bottoms of vessels in Portland before the days of drydocks? A. Yes.

Q. What has been the nature of your experience in that respect?

A. I hove them down, turned them bottom up. I turned the "Cheeseboro" upside down, turned the keel out of water, put sixty feet of new keel on her, calked her, recoppered her; her tonnage was fifteen hundred and fifty tons, a wooden ship.

Q. How many masts? [59]

(Deposition of Robert McIntosh.)

A. Three masts, full-rigged ship. The bark "Director," I done the same thing to her.

Q. How would you turn those vessels down?

A. I secured the lower masts with shores to the deck and put cables to the opposite side and hove her down to a barge afloat with heavy tackles, tackles with five-inch rope and four-fold blocks.

Q. What did you do to the "Director"?

A. The same thing, with the exception of the keel. Stripped her copper off, calked her and recoppered her. And another ship I repaired with a cofferdam, the ship "Seaforth." I put a new plate on the bottom, repaired her stern post, which was broken, and her garboard strake aft, and repaired her rudder.

Q. What did you say about a cofferdam?

A. That was done with a cofferdam underneath the vessel's bottom, forty feet long.

Q. What do you mean by a cofferdam?

A. It is a box you make and fit around the vessel's sides, and then pump the water out, and it is a small drydock then as far as it goes. The steamer "Wilmington," I done the same thing, and done something I never heard of being done. I put a cofferdam up to the keel on one side and in the middle of her put a new plate in the bottom twenty feet long.

Q. Now, getting back to the "Nottingham," will you state whether or not you are the Robert McIntosh that Mr. Cornfoot mentioned in his testimony as the one who was to join with him in making the re-

(Deposition of Robert McIntosh.)

pairs to the "Nottingham" under Mr. Cornfoot's bid? A. I am.

Q. Did you have a copy of the specifications?

A. This is my copy (indicating).

Q. The one which has been introduced in evidence as Cornfoot [60] Exhibit 1?

A. Mr. Cornfoot's copy was included in the bid. That is my original copy.

Q. Who delivered the bid? A. I did.

Q. To whom? A. Mr. Thorndyke.

Q. Did you have any conversation with him at that time?

A. We had a little joking conversation about one *thing another*; nothing to speak of. He wanted to know if this bid was all right. I said it was. He wanted to know who Mr. Cornfoot was. I told him he was engaged, but he could see him in the afternoon. And we saw him in the afternoon. Mr. Thorndyke was going away that afternoon and I took Mr. Cornfoot around; and the agent for the bonding company was there at the time ready to sign any bond that was brought forward, if it was necessary.

Q. Will you state whether or not a letter was delivered with the bid to Mr. Thorndyke from the bonding company? A. I enclosed it myself.

Q. Well, was it, or was it not, delivered to Mr. Thorndyke?

A. It was delivered to Mr. Thorndyke.

Q. Will you look at Cornfoot Exhibit 2, and state whether or not the exhibit is a copy of that letter?

A. Yes. And more than that, I read that, the

(Deposition of Robert McIntosh.)

same as that, the original letter up in the office of McCargar, Bates & Lively. That was correct.

Q. Was the letter that you delivered to Mr. Thorn-dyke ever returned to you? A. No, sir. [61]

Q. What part of the work called for by the specifications were you to do under the Albina Engine & Machine Works' bid?

A. Well, it is pretty hard to segregate that now.

Q. Generally speaking?

A. Well, it was all the woodwork, all the painting, all the fastening, all the calking, all the rigging; and that was my part.

Q. What about the masts?

A. The masts; that incudes the masts, the three masts, top mast and rigging.

Q. What part was Mr. Cornfoot to do?

A. His part was to do all the iron work connected with the rigging work, chain plates, turn buckles, chains of all kinds, furniture, stores and machinery work and donkey-engine, and whatever else was to do, ring-bolts, and everything like that; all iron work connected with the masts and spars; that means everything, chain plates and all the rest of it.

Q. What equipment did you have of the equipment which would be required to do the work on the "Nottingham"?

A. I had all the equipment necessary to do the work on the "Nottingham," or any ship that is in the Port of Portland now, or that might ever come in here, to put rigging on her in the shape of blocks and ropes and tackle of all kinds, screws, everything.

(Deposition of Robert McIntosh.)

Q. What about tools?

A. I have all the tools, all the calking tools; the men furnish all other calking tools except the hawsing irons and beetles. I have got all the hawsing irons and beetles necessary to calk a ship.

Q. What about the carpenter's tools?

A. The carpenter's tools, I have got all of them; jack-screws and clamp-screws and crowbars, turn-buckles, or, rather, call them drawing-spikes—everything. [62]

Q. Of the equipment that you did not have, what would be required to do that work?

A. The only equipment I didn't have we could get at the Port of Portland Drydock, or the Albina derrick; that is to take the sticks out and put them in. The Port of Portland derrick. I put that up myself; it will lift any stick the vessel had.

Q. What do you mean by stick, mast?

A. Mast; yes; right at the dock; didn't need to move away from the dock.

Q. What do you call that gear, sheers, or what?

A. No. This is a derrick gear, boom derrick.

Q. Where did you propose to do the repair work on the "Nottingham"? A. Right at St. Johns.

Q. At what plant?

A. At the Port of Portland, where you get free wharfage if your ship has been docked. That is, after she has been off of the dock, you don't. While you are waiting to go on the dock you get free wharfage.

Q. Will you state whether or not you planned to

(Deposition of Robert McIntosh.)

put her on the Port of Portland Drydock, as called for by the specifications? A. Yes, sir.

Q. What preparations, if any, did you make to undertake the repairs called for by the specifications under your bid?

A. I made all the preparations by going and finding out, getting estimates for all the work that was to be done there, that we had to furnish; sails, boats; I telegraphed to San Francisco and wrote to Seattle to get the price on boats there through the advice of people that were better acquainted than I was. I got prices on boats from both places. There was two boats to be furnished. I got prices on sails from the Willamette Awning & Tent [63] Company; all wire rigging furnished by the Roebling Company, Roebling & Sons; all my running gear was furnished by the Honeyman Hardware Company; all my rope and blocks were furnished by them at the price stated.

Q. In what manner do you prepare the wire rigging?

A. Well, you have got to serve it, or parcel it with canvas and serve it.

Q. Where did you propose to do that work?

A. Right at the drydock, on the wharf, or probably in the ship's hold. The chances are it would have been in the ship's hold.

Q. Did you have the equipment necessary for that? A. Yes, sir.

Q. Did you, at any time, make any inspection of any wires or rigging with the master of this vessel

(Deposition of Robert McIntosh.)

which might be required to carry out your bid?

A. I didn't quite understand that.

Q. Did you, at any time, make any inspection with Captain Swenson of the "Nottingham," of the wires or rigging that would be required to carry out the repairs?

A. Well, I met Captain Swenson nearly every day, and we was talking about the job so often that it came to be this way: "When you start that job," he always said, "I want so-and-so, Mack; I want this done and that done."

Q. We don't care about the conversation with him.

A. "I would like to have the service so; I would like to have the rounding so."

Mr. CLISE.—I object to the witness detailing conversation with other parties.

Mr. CAMPBELL.—Yes, but he is detailing it with your agent.

Mr. CLISE.—It doesn't make any difference who.

WITNESS.—We went over to the ship chandlers, too; we looked [64] at the parceling—not the parceling, the spun-yarn for the service; and he was very particular to see everything was all right before he would have it used. The rope he spoke about frequently.

Q. Did you inspect any rope with him?

A. Well, we looked at it in the shop when we were there. There was several open coils there, and we were comparing one with the other, the New Bedford rope and the Portland Cordage Company rope; he said one was equally as good as the other.

(Deposition of Robert McIntosh.)

Q. Did you inspect any wires?

A. No, we didn't inspect any wires.

Q. Now, what, if anything, did you do in preparation of the masts?

A. I got estimates from the North Pacific Lumber Company, which was the lowest, and several others, which you have got there now; from Mr. Mackay, the president of the North Pacific Lumber Company, for three lower masts and four other spars, or three other spars; the others I had myself.

Q. Did you make any preparation for the working, or for the turning up of the masts?

A. No; that would be all hewed with an axe.

Q. Where did you propose to do that work?

A. Right at the drydock.

Q. Will you state whether or not there was the necessary equipment on hand?

A. The necessary equipment, yes; I have made several down there, a good many.

Q. Now, Mr. McIntosh, of the bid of \$20,950 of the Albina Engine & Machine Works, I want to ask you how much you figured as the cost of drydocking the vessel, including the cost of towing the vessel to and from the drydock? [65]

A. Well, there was the dock dues. I think the drydock dues were three hundred and eighty-two dollars. I haven't got that paper here. I have got it all marked down there, haven't I? I can't recollect without seeing it. These are my original figures there. That is the paper there (indicating).

Q. Have you with you your original figures?

(Deposition of Robert McIntosh.)

A. There are my original figures here (indicating).

Q. When did you make up your figures?

A. These figures were all made up previous to the bids being tendered.

Q. In preparation for the bid?

A. In preparation for the bid; yes, sir.

Q. Now, will you answer the question that I asked you, please? A. Which was that?

Q. How much of the Albina Engine & Machine Works' bid did you figure as the cost of drydocking the vessel, including the cost of towing her to and from the drydock?

A. Three hundred and eighty-two dollars was the cost of drydock, and the moving would only be the hauling of the ship into the dock. I don't know what that would be exactly.

Q. Where was she at the time?

A. Right alongside at the end of the floating dock, the wharf.

Q. Now, how many days' labor did you figure under your bid for the work on the bottom requiring the vessel to be on the drydock, exclusive of calkers and cementers? A. Twenty-five men one day.

Q. That is, it would take twenty-five men one day?

A. Yes.

Q. To do the work on the bottom, outside of the calkers and the [66] cementers?

A. Outside of the calkers and the cementers, yes.

Q. How many days' labor is that?

A. Well, figuring at five dollars per day.

(Deposition of Robert McIntosh.)

Q. No, I don't mean the value of it; I mean how many days' labor. How many days' labor would you say that was? How do you speak of it in ship parlance?

A. We put that as twenty-five days, one man.

Q. Is that in doing the work called for by the specifications? A. Yes.

Q. How many days' labor did you figure on under your bid for painting the bottom? A. Thirty.

Q. That is to say—

A. (Interrupting.) Thirty days for one man.

Q. How many coats of paint did that require?

A. Two coats.

Q. What character of paint?

A. Woolsey's copper paint.

Q. Was that in accordance with the requirements of the specifications?

A. That is what was called for; yes, sir.

Q. What did you figure the total cost of the paint plus the labor on the ship's bottom?

A. Well, there is a hundred and eighty—would be two hundred and eighty—three hundred and eighty; a hundred and eighty for the paint, ten cases, and a hundred and fifty.

Q. How much, you say, for the paint?

A. Ten cases, eighteen dollars a case, one hundred and eighty, and that would be two hundred and eighty; that would be three hundred and eighty—three hundred and eighty dollars. [67]

Q. I think your addition is wrong. It would be three thirty, wouldn't it?

(Deposition of Robert McIntosh.)

A. No. A hundred and eighty—two hundred and eighty—yes; three thirty; that is right; three hundred and thirty.

Q. How many days' labor did you figure under your bid for the calking and cementing of the seams and butts and hood ends in the bottom, including the cement?

A. Thirty-five days; one man thirty-five days.

Q. How much did you figure under your bid would be the cost for the labor you have just mentioned, the oakum, calkers, cement and oil?

A. About one hundred and forty dollars; about thirty-five dollars for material and—yes, that would be about right. Thirty-five dollars for material.

Q. How much for the labor?

A. Labor, one hundred and forty, which makes one hundred and seventy-five.

Mr. CAMPBELL.—That is all.

Cross-examination by Mr. CLISE.

Q. Mr. McIntosh, did the Port of Portland build a drydock for itself under contract or did they buy it from someone else?

A. The Port of Portland built a drydock.

Q. Yes; did they build the drydock at St. Johns?

A. The drydock was built in the year 1902 and went in operation in April, 1902. It was built at Vancouver, in Washington, by the City of Portland and County of Multnomah.

Q. And then brought—

A. (Interrupting.) Brought and placed here, at a cost of three [68] hundred and sixty-eight thou-

(Deposition of Robert McIntosh.)

sand dollars exclusive of the machinery and the location.

Q. It has then been always under their ownership and control, has it?

A. It has been under the City of Portland's control. I believe Portland owns it.

Q. And do they furnish free dockage to anyone and everyone?

A. They don't furnish free dockage to anyone, only the fire boats and the pilot schooner.

Q. I understood you to say you would get free dockage?

A. No, sir; I said wharfage if your ship was going in the dock.

Q. But you got free wharfage?

A. Free wharfage while you are waiting for the dock. After you came off of the dock, you will be paying a dollar per day per thousand tons—a dollar and a half a day. No wharfage dues until after she came off of the dock.

Q. So you would be compelled to pay wharfage fees?

A. That would be a dollar and a half a day for the "Nottingham."

Q. All the time after she came off of the dock?

A. All the time after she same off of the dock; maybe two dollars. It would be anything over a thousand, a thousand or over.

Q. You mean that a vessel of a thousand tons or over would pay two dollars a day?

A. Yes; one thousand tons would be one dollar;

(Deposition of Robert McIntosh.)

anything over, a fraction over, would be two dollars per day.

Q. It don't make any difference what kind of vessel?

A. What kind of vessel, steamer, craft of any kind, except scows; they don't let them lay alongside of the dock.

Q. When did you leave the employ of the drydock of the Port of Portland Commission? [69]

A. 1909; in December, 1909.

Q. Was that about the time that the "Elder" docked?

A. No, sir; the "Elder" was docked three years before that—four years.

Q. Now, you spoke of doing some work on a vessel called the "San Jacinto"? A. Yes, sir.

Q. When was that?

A. That was January, two years ago last January, I think; two years ago last January, yes.

Q. That was January, 1910?

A. I think it was; yes.

Q. January, 1911?

A. 1911; yes, sir; I believe that was. That is two years; yes.

Q. Yes, January, 1911. Now, what is the difference between masts that are placed in these steel vessels that you have testified concerning and the "Nottingham"? Are the masts exactly similar?

A. Similar in size, only one is steel and it is hollow, and the other is wood and solid, put in exactly the same, with step the same way, rigged the same

(Deposition of Robert McIntosh.)

way, only one is iron or steel and the other one is wood.

Q. What was the length of the mainmast of the "Nottingham"?

A. One hundred and nine feet and some inches. One hundred and twelve feet I figured on for cutting the sticks. We always allow something for cutting off the ends to get a good sound end. The approximate length is one hundred and twelve feet, I think.

Q. Now, you have spoken of the "Indiana" and the "Sea King." How were they rigged compared with the "Nottingham"?

A. Well, there was a difference. Well, the topmast and the gallant mast, and the "Nottingham" had only a topmast and lower mast. [70] They had three masts in one. They had a lower mast, topmast, gallant mast and royal mast. That makes three pieces; and then the yards on each one of these masts: main yard, lower topsail yard, upper topsail yard, main top gallant yard, upper top gallant yard and royal yard. That is the difference. There is five or six yards difference. The "Nottingham" is a fore and aft rigged vessel, and the other is a square-rigged.

Q. Now, when it comes to comparing the amount of work that you were going to do on the "Nottingham" and the amount Mr. Cornfoot was going to do, about what percentage of the total work were you going to do? A. Mine would be about two-thirds.

Q. Wouldn't it be a great deal more than that? Wouldn't it be about ninety per cent?

(Deposition of Robert McIntosh.)

A. Oh, no; no, no. Mine was fourteen thousand and something, and his bid was twenty thousand nine hundred and fifty. I think I have got it right here what it was. It was fourteen thousand something, anyhow, because he had all the furniture and things to furnish there. I don't know whether I have got it here or not. My proportion was fourteen thousand and some hundred dollars, to twenty thousand nine hundred and fifty. That was the proportion. That would be about two-thirds, wouldn't it? Between fourteen and twenty-one; that is what it is.

Q. How do the sails on these square-rigged vessels compare with the sails on the "Nottingham"?

A. Well, they are a different weight of canvas in some cases, and sometimes equally as heavy. The sails are made in a different shape. They are longer in the hoist, and they are shorter in the fore and aft way, the square sail.

Q. The square sail you are speaking of now? [71]

A. The square sail. The fore and aft sail has a great deal more hoist than a square sail has in a square-rigged vessel, but it is not so long fore and aft as it is across the ship of a square-sail vessel. The mainsail on a full-rigged ship, square-rigged ship, would be about eighty feet in length on the head and about eighty-five feet in the foot, and from eighteen to twenty-two or thirty feet deep.

Q. That is the mainsail? A. On a sailing ship.

Q. On a square-rigged—

A. (Interrupting.) On a square-rigged vessel.

Q. Now, how about the schooner?

(Deposition of Robert McIntosh.)

A. On a fore and aft schooner her hoist would be probably—

Q. (Interrupting.) Say, take the “Nottingham,” for instance.

A. I am just taking the “Nottingham.”

Q. Yes.

A. Now, let's see. It would be eighteen, twelve, twenty, thirty—

Q. (Interrupting.) Hold on. He is just figuring. A. I am taking the hoist.

Q. I mean, don't think out loud, because the reporter is taking this all down. Just think to yourself.

A. About sixty-five feet of a hoist; sixty to sixty-five feet; and fore and aft it would be—I am taking the mainsail, now.

Q. Yes.

A. Probably forty-five or fifty feet.

Q. What number of canvas would you use on the square-rig and on the schooner rig?

A. Well, it would be number nothing, or number one.

Q. Would you use the same on both? [72]

A. Yes. The mainsail on a square rigged vessel would not be so heavy as you would have; it would be a little lighter. It would be number one probably. Number one is a little heavier.

Q. So I understand, number one on the square rig and nothing on the schooner?

A. Well, it would depend on what sail it was, whether the fore sail or the mainsail. The fore sail

(Deposition of Robert McIntosh.)

on a square rig would be number nothing; the mainsail would be number one.

Q. We are speaking of the mainsail.

A. That would be according to the judgment of the managing owner what kind he wants to use, or the captain of the ship. On the fore and after you can use any canvas he wishes.

Q. What number of canvas do these specifications call for for the "Nottingham"?

A. Number nothing, I think.

Q. And it is usual to put number one on the square rig?

A. Well, they put both numbers, number one and number nothing. They can put either one they like. It depends altogether on the ships. And the purchasing agent has something to do with that sometimes, and other times the captains and the owners. But nothnig or number one, anyway; not less than number one.

Q. On the square rig?

A. On the square rig, or on the fore and after either.

Q. The "Asie" is a steel vessel, isn't she?

A. The "Asie"?

Q. Yes. A. Yes; a French steel vessel.

Q. Square-rigged?

A. Square-rigged, and three masts and jigger rigged on the fourth mast. [73]

Redirect Examination by Mr. CAMPBELL.

Q. What did you estimate in your bid as the cost of renewing the mast steps?

(Deposition of Robert McIntosh.)

A. I think it was one hundred and twenty dollars. New steps for three masts; there it is; one hundred and twenty dollars.

Q. Did you have the sail plans of the ship?

A. Yes, I had the sail plans, sure, and gave them to the—I went and figured out the sails with the sail-maker; that is, I showed him what sails we wanted, and everything, and left the sail plans with the foreman of the Willamette Tent & Awning Company and the other company here. Both of them had the plans.

Q. From whom did you obtain the sail plans?

A. From the captain. I got all the sail plans and everything, both the rigging and sail and mast plans all in one.

Q. Do you know whether they showed the weight of canvas?

A. No, I don't. They might have done that. We figured according to what was on the plan, number one and nothing. I guess it did show that; I am not sure.

Q. Did you discuss with the captain the sails?

A. No; no, I didn't.

Q. You said that the "Asie" was a steel vessel. What were her topmasts made of, steel?

A. Steel; yes; all in one piece; top mast and lower mast were all in one in that vessel, one hundred and thirteen feet long, or a hundred and thirty feet long.

Q. What were the character of her topgallant masts? A. Wood.

Q. And what would be the character of the yards?

(Deposition of Robert McIntosh.)

A. The lower yards, what we call the lower yards, the main yards and [74] topsail yards were iron or steel, and the others were wood, the topgallant and royal yards.

Q. Were wood. The specifications provide this: "Before ship is again placed in water, entire plank-ing of hull to be searched for leaks with hose on in-side."

A. Yes, sir; that is done frequently. We do that frequently if it is requested.

Q. Now, Mr. McIntosh, did you intend under your bid to do that? A. Yes, sir.

Q. If a leak had been developed in the ship's side by that test, will you state whether or not the correct-ing of that leak would have been done by you under your bid?

Mr. CLISE.—I object as incompetent, irrelevant and immaterial, and the specifications and bid will speak for themselves.

WITNESS.—Can I answer it?

Mr. CAMPBELL.—Yes.

A. Yes, sir.

Recross-examination by Mr. CLISE.

Q. You have got your original notes there, have you? A. That is them, right there (indicating).

Q. Will you please refer to them and tell me what bid you received for the sails.

A. Yes, sir. It is right here. This bid includes for the sail. It includes the sails, flags, tarpaulins, sail covers and mast coats, twenty-eight hundred dol-lars net.

(Deposition of Robert McIntosh.)

Q. What quality of canvas were you calling for there?

A. According to what the specifications called for.

Q. What the specifications called for? [75]

A. Yes, sir.

Q. Did you go over the vessel frequently with the Captain?

A. I did. I went over frequently, both after the bids were opened and before they were opened.

Q. Did you discover anything at that time that indicated that there was a leak?

Mr. CAMPBELL.—Now we object to this as not a proper recross-examination, and shall insist that counsel make this man his own witness.

Mr. CLISE.—I will withdraw the question. That is all.

AND FURTHER DEPONENT SAITH NOT.

Signature waived. [76]

**[Deposition of William Cornfoot, for Respondent
(Recalled).]**

WILLIAM CORNFOOT was thereupon recalled on behalf of the respondent and further testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. Mr. Cornfoot, do you recall having any conversation with Mr. Thorndyke at the Oregon Hotel in which the amount of your bid and the time under which the work was to be performed was discussed?

A. Yes, sir, that was spoken of.

Q. What was said between you as to the time?

A. Mr. Thorndyke asked if—

(Deposition of William Cornfoot.)

Mr. CLISE.—(Interrupting.) I object to the question, on the ground that unless it is part of the *res gestae* it is incompetent, irrelevant and immaterial.

Mr. CAMPBELL.—Well, will you admit that time was not material to the performance of this contract?

Mr. CLISE.—No, sir.

Mr. CAMPBELL.—Well, you state it in your call for the bids, that time is not a great issue herein.

Mr. CLISE.—Well, it can be considered, but I will just let that speak for itself.

Mr. CAMPBELL.—Q. You may state what was said between you.

A. Well, the subject was brought up about the time that ours was the highest, the longest time that was specified, and Mr. Thorndyke asked if the time could be reduced, and Mr. McIntosh was there at the same time as I was, and he said, yes, the time could be reduced, but it would increase the bid.

Q. What did you offer to reduce the time to, and how much did you offer to increase the bid for such reduction?

A. A thousand dollars was the amount of money that was spoken of [77] in the conversation; and the time, sixty-five days, was our original bid, I think. The time that was spoken of then, I think it was ten days that was spoken of being taken off the time.

Q. How did the time that was mentioned compare with the time of the bid of the St. Johns dock, the

(Testimony of William Cornfoot.)

next highest bid?

A. Their time was lower. I don't remember what their figures exactly were on the time.

Mr. CAMPBELL.—That is all.

Mr. CLISE.—That is all.

AND FURTHER DEPONENT SAITH NOT.

Signature waived. [78]

[Deposition of Robert McIntosh, for Respondent
(Recalled).]

ROBERT McINTOSH was thereupon recalled on behalf of the respondent, and, having been previously sworn, testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. Have you, Mr. McIntosh, any recollection of that conversation?

A. Yes, sir, I recollect it, but I don't remember the dates. We offered to reduce to the same amount of days that the St. Johns people bid on, at the increase of one thousand dollars.

Mr. CAMPBELL.—That is all.

Mr. CLISE.—That is all.

AND FURTHER DEPONENT SAITH NOT.

Signature waived. [79]

United States of America,
State of Oregon,
County of Multnomah,—ss.

I, Alva W. Person, a Notary Public in and for the State of Oregon, duly commissioned and sworn, hereby certify:

That on August 1st, 1912, at ten o'clock A. M., there appeared before me at the offices of Messrs.

(Deposition of Robert McIntosh.)

Wood, Montague & Hunt, Room 616 Spalding Building, in the City of Portland, County of Multnomah and State of Oregon, H. R. Clise, Proctor for Libellant, and Ira A. Campbell, Proctor for Respondent in the foregoing case, who thereupon entered into the stipulation appearing on page numbered 1 hereof, and thereupon and pursuant thereto William Cornfoot and Robert McIntosh were produced as witnesses on behalf of the respondent and were by me first sworn to testify to the truth, the whole truth and nothing but the truth, and were then examined and re-examined by Mr Campbell on behalf of the respondent and cross-examined by Mr. H. R. Clise on behalf of the libellant, and said examinations and the testimony of said witnesses were reduced to shorthand by me and thereafter by me transcribed into typewriting, and the foregoing transcript, pages numbered 1 to 50, both inclusive, contains a full and true record of all thereof.

I further certify that the two papers hereto attached and marked "Cornfoot Exhibit 1" and "Cornfoot Exhibit 2" and initialed by me, are the identical papers identified by the witness Cornfoot and offered in evidence.

I further certify that the signatures of said witnesses were waived by stipulation between said proctors.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal, this 12th day of August, 1913.

[Seal]

ALVA W. PERSON,
Notary Public for Oregon. [80]

**Cornfoot Exhibit 1 [Notice of Globe Navigation Co.
Ltd., to Bidders].**

GLOBE NAVIGATION COMPANY, LTD.

215-6 Globe Building.

Seattle, Wash.

Office of the Manager.

To Bidders: Schr. "Wm. Nottingham."

Owing to an agreement owners have with the Port of Portland Commission, the vessel must be docked on their floating dock at St. John's incident to necessary bottom repairs, therefore in making tender for this work, bidders must agree with the owners to carry out that arrangement, bidders of course paying all dockage and other costs.

Time is not the great issue herein; but owners will weigh difference in time submitted to be consumed for doing the work, therefore bids should plainly set forth the number of running days he will consume to do the work.

All bidders should submit with their tender a statement from a reliable indemnity company agreeing to furnish surety bonds in sum required in the specifications.

GLOBE NAVIGATION COMPANY, LTD.

GFT/CT.

Cornfoot Exhibit 1. A. W. P. [81]

**[Cornfoot Exhibit No. 2—Specifications for Repair
to Am. Schr. "William Nottingham."]**

SPECIFICATIONS

For Repairs to Am. Schr. "William Nottingham."

Tenders are hereby requested for making the fol-

lowing enumerated repairs and supplying all of the sails, stores, outfit and equipment contained in the list attached to this specification.

Vessel to be taken from where she now lies by the contractor and returned to same berth by him or them after all repairs are completed, contractor to pay all costs of removal and return.

It being the intention of the following specification to briefly describe the spars, running and standing rigging, iron work, sails, etc., necessary to place vessel in the same good condition as before the accident, therefore the contractor will be called upon to observe not only the letter but the spirit of the contract. The work called for under this contract to include the removal of the stumps of the old masts, the removal of the old chain plates and all work and labor necessary to install the new spars, iron work, running and standing rigging, sails, blocks, outfit, equipment and gear, and all rigging to be set up, seized off, served and sails bent in readiness to sail, to the satisfaction of the Master or owner's representative.

SPARS:

The new spars to consist of the following:

Mainmast and main topmast.

Mizzenmast and mizzen topmast.

Spankermast and spanker topmast.

Fore boom.

Main boom and gaff.

Mizzen boom and gaff.

Spanker boom.

1 Cargo gaff.

Crosstrees, trestletrees and spreaders for each of the three new masts.

New hardwood steps to be installed to each of the three new lower masts and new wedges and mast coats as before. [82]

Suitable protection boxes to be built in two parts over mast coats in the usual manner.

Length of lower masts about 112 feet over all.

Main mizzen and spanker masts are about 25" in diameter at the deck, 21½" at the spider bands and 23" at heel. Mast heads are about 13' long and squares 17½" and 13", length from heel to deck 18'.

IRON WORK:

To include all new chain plates for the three after masts, all new iron work necessary for the three after masts and topmasts, the overhaul and repairs of all existing bands and iron work that may be used again in re-rigging the vessel, including the iron work, on foremast, fore topmast, bowsprit and fore yard, also the removal and repairing or renewing the port fore topmast backstay turnbuckle and chain for same, and the chain plate and turnbuckle for after swifter to port lower rigging. NOTE: All chain plate bolts to be driven through and clinched over rings on inside.

STANDING RIGGING:

Fore royal stay to be renewed together with martingale guys on both sides and new martingale. The foretopmast rigging on both sides to be renewed together with turnbuckles. The turnbuckle for spring stay on foremast to be renewed, the port out-rigger on foremast to be replaced by new, also bail for fore throat halyards.

All fore rigging, head stays, etc., to be come up, eyes and nips to be turned out for examination and the whole reserved, set up and seized off as before, and any missing ratlines on fore rigging to be replaced by new.

All standing rigging to the main, mizzen and spanker masts to be entirely renewed, together with turnbuckles. The lower rigging to consist of four swifters on each side of the main and mizzen, three on each side of the spanker, two topmast shrouds on each side [83] of the four topmasts and one topmast backstay on each side of the main, mizzen and spanker. The head stays, jumper stays and spring stays to be as shown on the sail plan supplied. The wire used to be galv. riggen of same size as that now on foremast, also the turnbuckles used to be same size as those now on fore rigging.

RUNNING RIGGING, BLOCKS, ETC.

The entire running rigging fore and aft to be replaced by new manila rope of first-class quality, of either the Portland Cordage Co. or the New Bedford make, all to be rove off in shipshape manner to the satisfaction of the master, who will give the contractor the size of rope required. The description of the blocks required, all of which are to be new, also to be obtained from the Master, the throat and peak halyard blocks to be 16" and all others in proportion. NOTE: All wire pennants except the square sail yard brace pennants to be served all over. The gaff topsail halyard runners to be served 25 ft. from clip hooks.

HULL REPAIRS:**FOKSLE HEAD:**

Rail on stbd. sidee to be refastened and two broken stanchions in way of same replaced by new.

Cast-iron chock in way of above damage to be replaced by new and graving piece to be fitted in buffalo rail in way of same.

One cleat for jib sheet to be replaced by new.

Side-light screens on both sides to be renewed and mouldings in way of fore chain plates renewed where damaged.

One glass deck light on port side to be replaced by new.

Four bulleyes to be renewed.

Iron hood over donkey-boiler to be replaced by new.

Scuttle for galley and galley smokestack to be renewed. [84]

Donkey-house scuttle lid to be repaired and refitted.

The quick work on port side to be refastened.

The covering board and nosing on after end of forecastle-head deck to be replaced by new.

UNDER FORECASTLE-HEAD:

Bulkhead and doors to galley to be entirely renewed; galley to be gutted out and all fittings such as drawers, bins, racks, dressers, etc., to be replaced by new.

The bulkhead on port side of donkey-room to be entirely renewed.

The cook's room and carpenter's room to be gutted out and refitted as before with two bunks in each

room, and bulkheads and doors to be renewed.

The wedges and coat for bowsprit to be replaced by new.

The coaming to forward scuttle to be refastened.

The door to boatswain's locker to be renewed.

The work bench in donkey-house and vice on same to be refastened.

The bulkhead right across after end of foksele to be refastened and refitted with new mouldings, corner pieces, windows, doors and frames.

The accommodations and lockers under forecandle-head to be thoroughly cleaned out, washed and painted as before, and the new work to receive three coats of good oil paint.

MACHINERY:

The donkey-boiler to be opened out, thoroughly scaled, any leaky rivets to be backed out and replaced by new and leaky seams to be calked and made tight.
[85]

Donkey-boiler to be filled up, closed and tested to one and a half times its working pressure.

New steam gauge and water gauge to be fitted to boiler. Piping to be overhauled and suction pipes to tanks to be renewed.

All valves and cocks to be overhauled and ground in, including safety valve.

Feed pump, general service pump and donkey to be opened up, overhauled, new valves fitted as necessary, adjusted and put in good working order.

Windlass counter shaft to be removed, put in lathe, trued up and returned with new pinions and bearings for same. The wood foundation carrying this

counter shaft to be split out and replaced by new.
The windlass itself to be overhauled and adjusted.

MAIN DECK:

The wood and iron battens for all three hatches to be replaced by new.

The hatch covers for all three hatches to be overhauled, repaired and missing and broken ones replaced by new.

The port main rail, pin rail and chafing plank to be renewed for a length of about 140 ft. to original scarphs. New copper facing to be fitted on both port and stbd. pin rails.

The after port mooring chock to have outside ring replaced by new.

6 deck planks in way of mainmast to be renewed to approved butts.

3 planks in way of mizzenmast to be renewed as above.

3 planks at spanker mast to be renewed from hatch coaming to beam on inside of poop. [86]

The deck planks where chafed in various places to be smoothed off.

The port pump to be removed and replaced by new, together with pipe if necessary. New upper box to be fitted to stbd. pump and the casing over pumps repaired and top renewed.

The wood seatings at the fore, main and mizzen sheet ring bolts to be renewed and each of the sheet ring bolts to be removed, faired and returned, and new rings fitted to same. One other leading ring bolt at the foremast to be replaced by new.

9 deck lashing ring bolts on each side to be re-

moved, straightened up and or renewed and returned.

Halyard ring bolts on rails for each mast to be faired up and renewed as necessary.

Port ladder to fore-castle-head to be renewed.

1 new gangway 36' long to be made and supplied.

6 hardwood brass mounted deck buckets, together with rack for same to be made and installed in an approved location.

Two 400-gallon water-tanks (iron) of usual pattern to be supplied and installed with foundation blocks, ring bolts and lashings or up and down bolts as may be approved.

Hand force pump to be overhauled and put in good working order.

CALKING DECKS, ETC.:

The foot of all bulwark stanchions to be calked and decks to be calked around hatches, together with one seam on each side of same for full length of vessel. Four seams along waterways on each side to be calked full length of vessel, carrying same right under fore-castle-head. Alleyways under fore-castle-head to be calked on each side. Fore-castle-head deck to be searched for leaks, calked where necessary and made tight, including quick work and superstructure on each side, 500 ft. of calking on poop to be done as directed. All seams to be paved with pitch or put-tied as before. [87]

POOP:

Overhang of poop to be renewed right across together with rail and stanchions on port side and in center.

Athwartship covering board to be renewed right

across break of poop including lodge knee at each end.

Two poop ladders from poop to top of house to be renewed and one from main deck to poop.

Three strakes of quick work and covering board on port side of poop to be renewed back to original scarphs. The whole to be calked and made tight.

Buffalo rail on port side to renew from break of poop to original scarph together with stanchions and guard-rail in way of same, also hardwood gangway stanchion at forward end.

Two planks in poop deck on port side to be renewed back to butts and covering board and moulding across forward end of top of house to be renewed.

Companionways, skylights, binnacle and wheel boxes to be overhauled and refitted, doors rehung, mouldings renewed where chafed, broken glass replaced by new, locks to be overhauled, woodwork painted and fittings put in good working order.

One 22 ft. life-boat with chocks, gripes, mast, rudder, sail, oars, water-breakers, boat cover and full equipment complete to be supplied and installed in place on poop deck.

One 17 ft. working boat with all gear complete including cover, davit, blocks and falls to be supplied and installed in davits with lashings complete.

One copper smokestack with Liverpool hood to be supplied and set in place for cabin stove. [88]

UNDER POOP:

Chief mate's and mate's and spare room to be entirely gutted out, including ceiling on ship's side

and rebuilt as before with new doors, bunks, drawers, lockers, decks and other fittings as before.

Storeroom bulkhead under poop to be repaired and doors to same to be renewed.

Toilet-room, all fittings to be removed, ceiling to be renewed and room to be refitted with old fittings provided same are in suitable condition, if not, fittings to be new. Lead pipe to toilet to be thoroughly examined and if damaged, same to be replaced by new.

The two after storerooms to be thoroughly cleaned out, fittings to be overhauled and returned, and flour locker to be relined with galv. iron as before.

After cabin to be cleaned out and refitted with cabin table, 2 rocker chairs, 1 Morris chair and 2 plain chairs. Carpet of approved pattern and of same quality as old to be laid.

Captain's room and office to be cleaned out, doors, lockers and fittings to be overhauled and refitted. Safe in captain's office to be overhauled, cleaned, painted and new combination fitted. Both of these rooms to be fitted with new carpet of approved pattern.

All doors throughout cabins to be overhauled, rehung and refitted.

Forward cabin, to be thoroughly cleaned out, settees to be repaired and fitted with new upholstered cushions as before, cabin to be fitted with dining-room table and 6 dining chairs.

The fore cabin, passageways, steps, two mates' rooms, one state-room and bath-room to be covered

with inlaid linoleum of approved pattern, quality as before. [89]

Pantry, fittings such as lockers, racks, shelves, dressers, bins, etc., to be overhauled and refitted.

PAINTING:

All accommodation under poop to be thoroughly cleaned, painted and varnished as before, and all new woodwork to be given three coats of good oil paint.

Decks, deck erections and fittings fore and aft to be given and coat of good oil paint as before, including all around bulwarks, poop and forecastle-head. (Tar to be used on main deck at owner's option.)

UPPER DECK:

Lazarette and sail locker to be cleaned out, sail locker to be rebuilt with shelves and stanchions and new floor planks to be laid over cargo chutes.

Water-tank under break of poop to be cleaned and cement washed and cover rejoined, wood covering around tank also to be renewed.

Covering around pump pipes to be repaired and made good as before.

Rope and oil rooms to be cleaned out and refitted as before.

HULL REPAIRS:

All chafed and bruised spots in planking around hull from water line to rails fore and aft on both sides to be dressed off smooth and graving pieces fitted where necessary.

Mouldings and chafing pieces in way of chain plates and fore and aft on both sides to be smoothed

off, repaired and renewed as may be found necessary to make same good as before, and seams in way of chain plates to be well calked before new plates are installed.

Ship to be placed on a suitable dry dock or marine railway, hull to be cleaned and painted with two coats Woolsey's copper paint on bottom and black to top of rail. [90]

Garboard strake on port side for full length where same is chafed to be trimmed off and graving pieces fitted as necessary.

The after length of shoe to keel to be removed and replaced by new with copper and felt between same and keel.

The cement in seams all over ship's bottom where started to be removed and replaced by new.

Garboard seams on both sides, hood ends of planking in all butts of bottom and topsides to be thoroughly calked, seams painted and cemented.

Before ship is again placed in water, entire planking of hull to be searched for leaks with hose on inside.

SAILS, TARPAULINS, ETC.:

The following sails to be supplied and bent:

- 1 foresail.
- 1 mainsail.
- 1 mizzensail.
- 1 spanker.
- 7 gaff topsails.
- 1 ring tail topsail.
- 1. fore staysail.
- 1 square sail to be repaired.

DESCRIPTION OF SAILS:

Foresail to be of No. O cotton canvas with one 20 ft. reef and heavy clew rings for reef, loose reef points $5/8''$ wire head and foot and full lining cloth. The entire length of after leach to have full cloth, the head foot and luff to have half cloth. After leach to have $6''$ manila bolt rope and covered the entire length, and double strengthening cloth at clews and reefs.

The mainsail and mizzen to be same as foresail except the reefs which are to be three reefs in each sail, one 6' lumber reef and two 12' reefs with loose reef points.

The spanker to have two 12' reefs, loose reef points and double reef cringles for each reef. [91]

Foresail, mainsail, mizzen and spanker to have double holes in luff and all holes, head, foot and luff to be covered with leather.

Ringtail and gaff topsails to be of No. 4 cotton canvas, roping to be covered from the head down after leach, foot and luff and up past the first reef and luff, all holes to be covered with leather.

Fore staysail to be of No. O canvas with one 10' reef and the after leach to be covered entire length.

Tarpaulins, 2 new tarpaulins for forward hatch 10'x10' $6''$, 2 for main hatch 15' $6''$ x27'x2'', 2 for after hatch 14'x19' $6''$. One canvas cover for cabin skylight, and sail covers of usual pattern for fore, main and mizzen and spanker, foreboom staysail and three jibs. [92]

STEWARD'S DEPARTMENT.

CABIN EQUIPMENT:

1 Complete dinner set for harbor use for 12 persons.

1 Complete dinner set for sea use for 12 persons.

Extras:

3 12" meat platters.

3 9" Oval deeps.

1 Doz. Mush bowls.

1 Doz. Coffee mugs.

2 Gravy boats.

2 Milk pitchers.

2 Water jugs, one 1 qt. and one 2 qts.

1 Syrup pitcher glass.

1 Mustard jar.

2 Salt and paper shakers.

1 Carving set.

1 Doz. knives.

1 Doz. each forks, table and teaspoons heavy plated.

2 Butter knives heavy plated.

1½ Doz. knives, forks, table and teaspoons, sea use.

1 Cabin tea and coffee pot.

1 Soup tureen.

1 Soup ladle.

1 Cabin stove and pipes.

3 White tablecloths.

3 Colored tablecloths.

2 Tea strainers.

1 Cabin dining-room lamp.

1 Pantry lamp.

- 1 1st mate room lamp.
- 1 2d mate room lamp.
- 1 State-room lamp.
- 1 Bath-room lamp.
- 1 Cabin hair broom.
- 2 3'x5' rugs.
- 6 18"x36" rugs.
- 1 4 gal. water filter.
- 1 Doz. water tumblers.
- 1 Cabin coal-scuttle.
- 1 Zinc for washing dishes, made to order.
- 2 Springs and mattresses for state-rooms.
- 1 Mirror after-cabin.
- 1 Mirror bath-room.
- 1 Bath-tub.

GALLEY EQUIPMENT:

- 1 5 gal. salt meat boiler.
- 1 3 gal agate ware boiler.
- 2 1 gal. agate ware saucepans.
- 2 3 qt. agate ware saucepans.
- 2 2 qt. agate ware saucepans.
- 2 1 qt. agate ware saucepans.
- 2 1 pt. agate ware saucepans.
- 1 1 gal. agate ware coffee-pot.
- 1 1 gal. agate ware tea-pot.
- 4 10" agate ware baking dishes.
- 6 10" meat pie deeps or mess pans.
- 1/2 Doz. pie plates.
- 1/2 Doz. cake plates. [93]

GALLEY EQUIPMENT.—Con'd:

- 2 Doz. Cup cake pans.
- 1 Doz. agate ware soup plates.

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- 1 Doz. agate ware mugs, pints.
- 1 Doz. knives, forks, tablespoons, teaspoons for sailors.
- 1 16"x16" roasting pan.
- 2 18"x14" bread baking pans.
- 2 18" frying pans.
- 3 Individual frying-pans.
- 3 22" dish-pans, heavy tin.
- 1 Zinc for washing dishes made to order.
- 1 Coffee-mill.
- 1 Butcher's cleaver.
- 1 Butcher's saw, 1 butcher-knife, 1 steel.
- 2 Potato peeling knives.
- 2 Basting spoons, 1 fork, heavy iron.
- 2 Soup ladles.
- 1 Water dipper.
- 1 Sausage machine.
- 2 Vegetable collander 12" and 8".
- 2 Gravy strainers 6".
- 1 Hot cake pan 10"x20".
- 2 Cake turners.
- 1 Skimmer.
- 2 Egg beaters.
- 2 Toasters.
- 1 Coal shovel.
- 1½ Doz. Pot scrapers.
- 1 Chopping tray.
- 1 Rolling pin.
- 1 Chopping knife.
- 2 Galv. iron buckets.

NAVIGATION INSTRUMENTS, ETC.

- 2 Chronometers to be repaired or renewed, old

ones are in Astoria at V. Roost.

- 2 Barometers.
- 1 Thermometer.
- 1 Set charts, coast and sailing of the Pacific.
- 1 Pr. dividers.
- 1 Pr. parallel rulers.
- 1 Pr. marine glasses.
- 1 Bliss taffrail log and line.
- 1 Deep sea lead line.
- 1 Binnacle lamp.
- 1 Binnacle clock.
- 1 Set international code of signals.
- 1 House flag.
- 1 American flag.
- 1 Set side lights.
- 1 Reading light. 2 extra lamps for same.
- 1 Set blue lights.
- 1 Fog Horn.
- 1 Flare up light.

DONKEY-ROOM TOOLS.

- 1 12" monkey-wrench.
- 1 10" monkey-wrench.
- 1 8" monkey-wrench.
- 1 18" pipe wrench. [94]

DONKEY-ROOM TOOLS—Con'd.

- 1 10" pipe wrench.
- 1 8" pipe wrench.
- 2 Oil squirt cans.
- 2 Coal oil cans.
- 2 Hand lanterns.
- 1 Box lantern.
- 1 Machine hammer.

- 1 Pr. blacksmith tongs.
- 1 Tube cleaner.
- 1 Solder iron.
- 1 Steam gauge.

CARPENTER TOOLS:

- 1 Set brace and bitt.
- 1 Hand drill and bitt.
- 1 Hatchet.
- 1 Crosscut and 1 rip saw.
- 1 Jack.
- 1 Smoothing plane.
- 1 Spoke shave.
- 1 Claw hammer.
- 1 Set blades for hacksaw.
- 1 1½" ship auger.
- 1 Oil stone.
- 1 Grindstone 118".
- 1 Horsing mallet.
- 1 Pr. pinchers.

DECK EQUIPMENT:

- 1 Jacobs ladder.
- 200' 2" delivery hose.
- 1 2" nozzle.
- 150' 1½" delivery hose.
- 1 1½" nozzle.
- 3 Fire axes.
- 1 Top maul.
- 1 Donkey fall 5/8" plow steel 280 ft.
- 1 Chain lumber sling 12 ft. 5/8" black iron.
- 1 Coil 9" manila hawser.
- 2 Coil 6" manila hawser.
- 2 Coil 4½" manila line.

- 2 Cork fenders.
- 3 Fore and aft wooden fenders 12 ft. long.
- 6 Up and down skid 3"x14x8' long.
- 1 Cargo sliding spar 8x8x40.
- 2 Cargo skids 10'x10' 2" planks.
- 20 Deck lashings 34 ft. long 3/4" galv. iron chain.
- 6 Hog lashings (part wire and part chain, wire part 28 ft. long, 3 1/2" rigging wire, thimble and shackle in one end chain 3/4" iron in the other chain part 13' long).
- 6 Mast band for hog lashings (made in two parts) with one heavy ring for 3 bands and 2 rings or links for the other three on each side of mast.
- 19 Turnbuckles galv. 1 1/4" for deck lashings, 1 1/2" for hog lashings. [95]

CONDITIONS.

With this specification a blue-print of the sail plan and rigging plan is supplied, said blue-print to be taken as a guide only, the measurements not being guaranteed. The contractor will be held responsible for the size and fit of all spars, sails, running and standing rigging, etc.

The vessel is now lying at the dry dock at St. Johns, Ore., where she can be seen by invited bidders.

All of the work called for to be carried out in a first class and workmanlike manner to the satisfaction of the master and owner's representative.

No extras of any nature whatsoever will be allowed unless previously agreed upon in writing between the parties interested.

All old material removed to become the property of the contractor, and all dirt and rubbish accumulated during the course of repairs to be removed by the contractor.

Contractor to be prepared to furnish satisfactory surety company bonds for the faithful performance of the work, amount of bond to be not less than 50% of the amount of contract price.

All full description of all rigging, sails, tarpaulins and other supplies to be obtained from the master on board the ship.

Tenders distinctly stating price and time required for the full and proper performance of the work to be delivered to Mr. G. F. Thorndyke at the Oregon Hotel, Portland, Oregon, by noon of Wednesday, January 10, 1912.

The right is hereby reserved to reject any or all tenders, and any tender not complying fully with the above specification and conditions, will not be given consideration.

S. F. THORNDYKE,

Manager Globe Navigation Company, Ltd.

Seattle, Wash., Jan. 1, 1912. [96]

DESCRIPTION OF RUNNING RIGGING,
BLOCKS, ETC.

The following description to be taken as a guide only, quantities not guaranteed correct, contractor to satisfy himself on same.

6 Boom tackle pennants 12' long, 3½" rigging wire,
hock in one end and thimble in other.

2 Boom tackle pennants 40' long, 3½" rigging wire,
hock in one end and thimble in other.

- 3 Boom tackle pennants 4' long, $3\frac{1}{2}$ " rigging wire, hock in one end and thimble in other.
- 4 12" double blocks common } boom tackle blocks.
- 4 12" single blocks common }
- 2 10" snatch blocks 2—8" snatch blocks.
- 4 16" lead blocks for throat and peak halyards patent.
- 18 16" patent blocks for peaks single.
- 2 16" patent blocks for throat triple.
- 3 16" patent blocks for throat double.
- 3 14" upper sheet blocks double.
- 6 9" double patent blocks for rope straps. (Purchase blocks).
- 3 reef shackles.
- 2 iron rods 1" galv., 13' long, hook one end, lip in other.
- 1 Sheet chain 1", iron 15' long, shackle $\frac{5}{8}$ " link in other.
- 4 throat and peak purchase pennants 13' long, $2\frac{1}{4}$ " rigging wire galv. clip hooks in one end, 9" patent block.
- 1 pennant same as other except 12' long.
- 2 fore brace pennants 13' 6" long, $2\frac{1}{4}$ " wire galv. rigging, clip hooks one end, 10" patent block in other.
- 3 doz. galv. $1\frac{1}{8}$ " iron belaying pins.
- 3 peak halyards, 1 coil 4" manila rope each 3 coils.
- 3 throat halyards 80 fths. each=240 fths. $3\frac{3}{4}$ " manila rope.
- 1 spanker halyard 90 fths. $3\frac{3}{4}$ " manila rope.
- 1 fore staysail halyard 50 fths. $3\frac{1}{2}$ " manila rope.

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- 3 jib halyards 140 fths. 3" manila rope.
- 4 jib down hards 1 coil $2\frac{1}{2}$ " manila rope.
- 320 fths. $2\frac{3}{4}$ " manila rope throat and peak purchase.
- 1 coil $2\frac{3}{4}$ " manila boom lifts.
- 4 coil $2\frac{3}{4}$ " manila topsail halyards down hard and tripan lines.
- 68 fths. $3\frac{1}{4}$ " topsail tack.
- 45 fths. $4\frac{3}{4}$ " fore, main and mizzen sheets.
- 30 fths. 4" spanker sheet.
- 1 coil $3\frac{1}{2}$ " boom tackle.
- 3 9" mealine bushed gaff topsail halyard blocks.
- 3 9" patent bushed gaff topsail halyard blocks.
- 2 9" patent bushed double iron strapped reef tackle blocks.
- 2 9" patent bushed single iron strapped reef tackle blocks.
- 1 7" patent bushed double iron strapped handy billie blocks.
- 1 7" patent bushed single iron strapped handy billie blocks.
- 9 8" patent bushed single for rope strap for gaff topsail down haul blocks.
- 2 10" metaline bushed single iron strap, single hook gaff topsail sheet quarter blocks.
- 3 10" common bushed double, single hook boom lift block.
- 3 gaff topsail sheet chain 12' long $\frac{1}{2}$ " link.
- 6 leather funnels for throat and peak halyards in wake of gaff.
- 2 square sail yard brace pennants 75' long $2\frac{1}{2}$ " wire galv. rigging wire.

- 4 wire straps 5 feet in circumference $3\frac{1}{2}$ " wire
serevd and covered with leather & heavy
thimble & ring in same.
- 50 fths. 3" manila rope squaresail braces.
- 54 fths. 3" reef tackles.
- 20 fths. $2\frac{1}{4}$ " handy billie.
- 60 fths. 4" peak and spanker down haul.
- 80 fths. $3\frac{1}{4}$ " topsail sheets manila rope.
- 45 fths. 3" ring tail topsail sheet manila rope.
- 220 fths. signal halyards manila rope.
- 36 fths. $2\frac{1}{2}$ " boat falls manila rope. [97]
- 30 ft. $\frac{5}{8}$ " flexible galv. steel wire pennants fore gaff
topsail.
- 54 ft. $2\frac{1}{2}$ " galv. wire topsail runners, 3 topsails 110'
each, clip hooks in one end, 9" blocks in other
end patent.
- Fore main and mizzen boom lifts 65' each (3" galv.
rigging wire, egg block in one end, shackle and
thimble in other)
- 3 $2\frac{1}{2}$ galv. rigging wire pennants, thimble one end,
8" eye other. Pin rails in rigging for lumber
reefs.

NOTE: All wire pennants except the 75 feet
squaresail yard brace pennants to be served all
over. The gaff topsail halyard runners to be served
25 feet from clip hooks. [98]

LIST OF STORES REQUIRED TO REPLACE
THOSE LOST OR DAMAGED "WM. NOT-
TINGHAM" DISASTER,

OCTOBER, 1911.

SLOP CHEST A/C.

5 Pr. blankets.	13 Pr. Overalls.
11 Pr. Mitts.	3 Pr. Arctic Sox.
7 Pr. Woolen sox.	18 Spools thread.
16 Handkerchiefs.	5 Packages needles.
5½ Suits Underwear, Med.	65 cakes soap.
2 Doz. cotton shirts.	6 gross matches.
2 Jumpers.	155 lbs. tobacco.
4 Towels.	9 Pr. rubber boots.
3 Sweaters.	8 oil suits.
15 Pr. shoes.	12 suits dungerees.
7 Pr. slippers.	12 suits underwear, woolen.
7 Pr. Tennis shoes.	2 doz. hats.
1 Oil skin coat.	1 doz. towels.
8 Souwesters.	2 doz. caps.
1 Doz. knives.	2 suits underwear, extra.
1 Pr. sea boots.	

CHANDLERY STORES:

3 cases illuminating oil.	1 stove pipe.
20 gals. Stockholm tar.	5 engine oil (Gals.).
10 gals. cylinder oil.	20 lbs. emery cloth.
50 lbs. oxide iron.	2 lbs. cotton waste.
15 lbs. mast coat lead.	2 doz. sand paper.
1 bale oakum.	75 lbs. G. S. Zinc.
1 heavy galv. iron 5" ell.	5 Gals boiled oil.
1 heavy galv. iron 7" ell.	5 cases raw oil.
18 lbs. asbestos.	5 gals. turpentine.
18 lbs. zinc.	2 doz. tins lye.

1 doz. bath bricks.	30 fms 31¼ manila rope bolt.
4 only deck brooms.	12-30 mast hoops 360.
2 galv. buckets.	6-17 mast hoops 102, 462.
1 coil #1 sq. flax packing.	1 Pk. 15½ R. E. Sail
8 ¾x6 mch. bolts.	needles.
1 coil 6" manilla, 793 lbs	2 Doz. asst. rope needles.
1 coil 4" manilla, 355 lbs	175 ft. N. C. lead 36#.
1 coil 3¾" manilla, 310 lbs	1 sad handle.
1 coil 2¾" manilla, 168 lbs.	30 lbs. cotton twine.
53 lbs. N. B. Linemar.	2 gals. spar varnish.
64 lbs. Hemp spunyarn.	Picture wire.
78 lbs. Manila spunyarn.	Brass screw eyes.
2 lbs. Chrome green.	5 gals. new jersey copper
1 Pc. rainbow sheet pack-	paint.
ing.	2 7/16 galv. ring screw bolts.
6 9½x15⅛x7⅛ lig sheaves.	6 #3 galt lamp wicks.
96 ft. 6" manila rope bolt.	

SUBSISTENCE STORES:

90 lbs. crew coffee.	24# corn starch.
10 lbs. crew tea.	2# A. & A. Soda. [99]
1 lb. red pepper.	1 tin asst. cakes.
100# rice.	356# D. G. Sugar.
25# sago.	550# G. C. Sugar.
25# tapioca.	356# butter.
4 tins crackers.	143# packing salt eggs.
9 lbs. cabin tea.	2 cases lard.
21 lbs. chocolate.	43# Y. A. Cheese.
150 lbs. evaporated potatoes.	3 cases cond. milk.
43 sacks flour.	40# roasted coffee.
10 10# sacks corn meal.	2 Box apples green.
130# rolled oats.	100# dry apples.

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50# evap. pears.	4 sacks S. W. Bears.
100# prunes.	125 lbs. sp. peas.
25# currants.	2 25# Bx. vermicelli.
25# citron.	2 25# Bx. macaroni.
5# cocoanut.	3 cs. stg. beans.
25# raisins.	5 cs. end. tomatoes.
3 cases asst. pie fruit.	3 cs. green peas.
1 case ex. table pears.	1½ tons potatoes.
1 case ex. table peaches.	200# cabbage.
1 case ex. table apricots.	1 sack turnips.
30 tins asst, jelly 2# tins.	1 sack beets.
1 case ex. table apples.	1 sack carrots.
3 gal. vinegar.	200# silverskin onions.
4 bot. V. C. Catsup.	2 cs. corn beef.
2 ca. sour pickles qts.	2 cs. boil beef.
4 bot. L. & P. Wor. Sauce.	1 cs. rst. mutton.
2 lge. curry powder.	2 cs. V. C. Soups.
7 1# tins mustard.	2 cs. club house sausages.
7 1# tins bl. pepper.	104# bacon.
1 # can allspice.	105# ham.
1 # can cloves.	2 25# kits salmon bellies.
1 # can cinnamon.	4 kits mackerel.
1 # can nutmeg.	2 hf. bbls. salmon.
2 1# tins ginger.	150# codfish in tins.
2 1# hops.	3 cases 64 doz. oysters.
10 cartons table salt.	2 cases 4 doz. mince clams.
50 # cooking salt.	2 cases 8 doz. salmon.
88 # lima beans.	3 jkts. syrup.
1 Bbl, mineral water.	1 5 gal. maple syrup.
50 Lbs. corn meal.	2 gals. molasses.
10 Lbs. sago.	¼ # bay leaves.
10 Lbs. tapioca.	3 Doz. lunch tongues.
50# pilot bread in tins.	2 cs. vienna sausage.

100# L. Bar Soap.	1 doz. lge. chimneys.
12 bars sapolio.	1 doz. #2 burners.
6 Bxs. toilet soap.	4 Pa. toilet paper.
9 Pa. gold dust.	½es. toilet paper rolls.
50 # sal soda.	5 gross matches.
1 Doz. pts. brilliantshine.	1 Bx. candles.
5 tins stove polish.	8 cs. coal oil.
2 Whisk brooms.	
2 Scrub Brushes.	

SUNDRY ITEMS TO BE FURNISHED:

- 1 revolver.
- 1 union jack.
- 1 burges. [100]

COPY.

Jany. 12, 1912.

Mr. Thorndyke,
Globe Navigation Co.,
Portland, Oregon.

Dear Sir:

We beg to advise that should you award the contract to the Albina Engine & Machine Works, for the repair of the Schooner "William Nottingham," we

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will execute a bond guaranteeing the faithful performance of his contract.

Yours very truly,
McCARGO, BATES & LINCH,
General Agents.

KVL/L.

Cornfoot Exhibit 2. A. W. P.

[Indorsed]: Depositions of William Cornfoot and Robert McIntosh, Witnesses on Behalf of Respondent Taken Before Alva W. Person, Notary Public for Oregon. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 18, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.
[101]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2156.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a
Corporation,

Defendant.

Amended Complaint.

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court.

Now comes the plaintiff by leave of court had this
24th day of February, 1914, and files this amended

bill of complaint, wherein and for cause of action against the said defendant, civil and maritime, alleges as follows:

FOR A FIRST CAUSE OF ACTION:

That the plaintiff, at all the times hereinafter mentioned, was and still is a corporation, organized and doing business under and by virtue of the laws of the State of New Jersey, and is the owner of the schooner "Wm. Nottingham" hereinafter referred to. That it is duly authorized to do business in the State of Washington, and has paid its annual license fee as such corporation last due to the State of Washington.

II.

That the Fireman's Fund Insurance Company is a corporation organized and doing business under the laws of the State of California, and duly authorized to do business in the State of Washington, and maintaining an office in said state for the transaction of its business. [102]

III.

That on the 17th day of April, 1911, the defendant made to plaintiff a policy of insurance, a copy of which is hereto annexed, for the sum of six thousand dollars, on the schooner "Wm. Nottingham" against the perils of the sea and other perils therein mentioned, during the time in said policy set forth, which is hereto annexed marked Exhibit "C."

IV.

That on or about the 2nd day of October, 1911, said schooner sailed from Westport, on the Columbia River, for Callao, Peru, carrying a cargo of lumber,

and while engaged on said voyage, and on October 8, 1911, said schooner encountered a terrific wind, which tore away one of the two life-boats, flooded the donkey-room and put out the fire under the donkey-boiler. Said gale continuing, early on the morning of the 9th of October the deck lashings parted and released the deck-load, a part of which went overboard, and carried with it the first or mainmast, then the mizzenmast and last the spanker mast. The connections between the donkey-boiler and the water-tank were broken and all fresh water was lost, and the schooner became completely filled with water. Through the efforts of the master and crew the vessel was nearly cleared of water, when another heavy gale came up, accompanied by high seas, which caused her to again fill rapidly. These conditions continued until the 13th, when the schooner, being water-logged and being practically unmanageable, there was great danger of her breaking up and being driven ashore, so that the officers and crew, for the safety of their lives, were compelled to leave and abandon her and seek safety in finding their way to the shore, and the said schooner being thereupon abandoned by her officers and crew, became a derelict, having lost, in addition to the three masts, all gaffs, beams, blocks, sails and running and [103] standing, rigging, and all iron work, and being otherwise damaged.

V.

That at about twelve o'clock noon on October 15, 1911, the steam tug "Wallula," owned and operated by the Port of Portland, Oregon, found said

schooner "Nottingham," a derelict and abandoned by her officers and crew, off the mouth of the Columbia River, and took her in tow and brought her to the port of Astoria, Oregon.

VI.

That on October 14, 1911, the Globe Navigation Company gave to the Firemen's Fund Insurance Company, at Seattle, Washington, notice that the schooner "Wm. Nottingham" had been dismasted in a severe storm, had become water-logged and abandoned by her officers and crew, and was a derelict on the Pacific Ocean, somewhere off the mouth of the Columbia River, and that said Globe Navigation Company surrendered and abandoned said schooner in her derelict condition to said Fireman's Fund Insurance Company to do with as they thought best.

VI½.

That on October 16, 1911, the Globe Navigation Company to confirm its verbal abandonment, made on October 14, 1911, gave to the Fireman's Fund Insurance Company a written notice of its abandonment of said vessel to said Insurance Company, said notice being in writing, a copy of which is hereto attached, marked Exhibit "B" and made a part of this complaint.

VII.

That from and after the 15th day of October, 1911, the officers and crew of said tug "Wallula" remained in possession of said schooner "Wm. Nottingham," and at all times refusing to deliver possession of said schooner, until about the 6th day of November, 1911,

in and on account of the salvage claim made as aforesaid, the additional sum of two thousand four hundred fifty-two and 45/100 dollars (\$2,452.45).

XI.

That the Trust Company of America, trustee mortgagee in Policy No. 103,834 of said defendant, has for value received sold, transferred and assigned all its right, title and interest in and to said policy of insurance, and any money due or to become due thereunder to the plaintiff.

XII.

That said voyage was so utterly broken up and lost, and said schooner and her outfit, cargo and stores were totally [106] lost by the perils of the sea and perils insured against in said policy, and the defendant had due notice thereof, and became bound to pay the sum insured in said policy to the plaintiff, together with said salvage and additional charges, as provided in said policy.

XIII.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court, and that said defendant is within said jurisdiction.

FOR A SECOND CAUSE OF ACTION against said defendant:

I.

Plaintiff repeats the allegations contained in paragraphs one and two of its first cause of action herein, to the same intent and purpose as if set forth at length herein, and makes said paragraphs a part of its second cause of action.

III.

That on the 17th day of April, 1911, the defendant made to plaintiff a policy of insurance for the sum of twenty-four thousand dollars on the schooner "Wm. Nottingham" against the perils of the sea and other perils therein mentioned, during the time in said policy set forth, which said policy of insurance is identical in every respect with the policy referred to in paragraph three of plaintiff's first cause of action, a copy of which is annexed to this complaint, save and except that the sum insured is twenty-four thousand dollars instead of six thousand dollars, and in case of loss, to be paid to this plaintiff instead of the Trust Company of America, and that the premium therefor was the sum of twelve hundred dollars instead of the sum of three hundred dollars, and the plaintiff incorporates here all the other terms and conditions of said policy, the same as if [107] set forth at length herein.

IV.

Plaintiff repeats the allegation contained in paragraphs four, five, six, six and one-half, seven, eight, nine, ten, twelve and thirteen of its first cause of action herein, to the same intent and purpose as if set forth at length herein, and makes said paragraph a part of this its second cause of action.

WHEREFORE, plaintiff prays judgment as against said defendant for the sum of thirty thousand dollars damages on account of the loss of said schooner "Wm. Nottingham," and for such other and further sums as said defendant may be liable to the plaintiff on account of the loss of said schooner,

and expenses incurred by said plaintiff incident to the matters and things set forth in its bill of complaint herein, and for such other and further relief in the premises as in law and justice it may be entitled to receive, and for its costs in this behalf expended.

CLISE & POE,
Attorneys for Plaintiff.

Post Office address:

405 New York Building,
Seattle, Washington. [108]

United States of America,
State of Washington,
County of King,—ss.

George F. Thorndyke, being first duly sworn, on oath says: that he is the manager of The Globe Navigation Company within the State of Washington; that he has read the foregoing bill, knows the contents thereof and that the matters and things therein stated are true as he verily believes, and that the matters and things therein stated are peculiarly within his knowledge, he having the control and management of plaintiff's affairs within said State.

GEORGE F. THORNDYKE.

Subscribed and sworn to before me this 6 day of February, 1914.

H. R. CLISE,
Notary Public in and for the State of Washington,
Residing at Seattle. [109]

Exhibit "B" [to Amended Complaint].

"Seattle, Wash., Oct. 16, 1911.

Fireman's Fund Insurance Company,
Coleman Building,
Seattle, Wash.

Dear Sirs:

You are hereby notified that we have just received telegram from the Master of the schooner "Wm. Nottingham" of which the following is a copy.

"Confirm Nelson's telegram 'Nottingham' filled October eight lost deckload and masts went by the board October ninth. Abandoned vessel October thirteenth latitude north 46.16, longitude west 125.25 fore and aft part of vessel gutted lost all fresh water. Do you authorize me to pay crew"?

In consequence of the damages sustained we hereby abandon to you the Schr. 'Wm. Nottingham' and claim for a total loss under the policies issued by you and outstanding upon her.

It will give us great pleasure to give you any information that you may require, or any assistance we can render in order to protect you. At present we are not informed as to the particulars.

Yours truly,

THE GLOBE NAVIGATIONCOMPANY,

Per G. F. THORNDYKE.

GFT/G. [110]

Exhibit "C" [to Amended Complaint].

No. 103,834.

Hull Time.

\$6000.—

**FIREMAN'S FUND
INSURANCE COMPANY
SAN FRANCISCO, CALIFORNIA.**

IN CONSIDERATION OF Three hundred
..... Dollars
to it agreed to be paid by the insured hereinafter
named By these presents Insures Six thousand
Dollars on account of

THE GLOBE NAVIGATION COMPANY
In case of Loss to be paid to The Trust Company of
America, Trust Mortgagee.

From the 20th day of April, 1911, at noon until
the 20th day of April, 1912, at noon Pacific Standard
time upon his or their interest as owners in the body
machinery, tackle, apparel, and other furniture of
the good schooner "Wm. Nottingham,"
Vessel Valued at Forty-five Thousand Dollars.

The insured in accepting this policy, hereby binds
himself or themselves according to the following
agreements and stipulations:

1st. In case of loss, same to be paid in sixty days
after proof and adjustment of loss and proof of in-
terest in the said vessel, (the amount of the notes
given for premium, if unpaid, being first deducted,
and all sums due or coming due to the Company from
the insured being first paid or secured to the satis-
faction of the Insurers), but no partial loss or par-
ticular average shall in any event be paid under this
Policy. This Company not to be liable for any sums

the insured may pay to another vessel, her cargo or freight, for or on account of collision.

If on a passage at expiration of the term, with liberty to the insured to renew the Policy for three months at the same rate of premium, if application be made to the Company on or before expiration of the first term. The risk, however, is to terminate at any port, or place at which the vessel may first arrive during the said extended time, on her being moored therein in good safety. A *pro rata* premium to be returned for each entire month not entered upon of the extended time, no claim being made.

2d. Each passage subject to separate average. A new passage shall be deemed to begin as soon as the vessel shall have discharged her Cargo at a Port or place of destination, or such part of her cargo as may be destined to such Port or place; or [111]

3rd. Touching the adventures and perils which this Insurance Company is contented to bear, and takes upon itself in this Policy, they are of the Seas, Fires, Pirates, Assailing Thieves, Jettisons, Barratry of the Mariners (but not of the Master), embezzlement and illicit trade, or any trade in articles contraband of war excepted in all cases, and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which insurers are liable by the Rules and Customs of Insurance in San Francisco, including the Rules for Adjustment of losses printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this policy.

4th. Not to use any ports or places on the west coast of the United States of America south of San Francisco except Santa Cruz, Monterey, San Simeon, Port Harford, Gaviota, Goleta, Santa Barbara, San Buena Ventura, Hueneme, Port Los Angeles (Santa Monica), Redondo, San Pedro, Newport and San Diego. Nor any ports and places on the west coast of America north of San Francisco nor islands adjacent thereto, except Umpqua and Columbia Rivers, Humboldt, Coos and Shoalwater Bays, Gray's Harbor, Sitka, Unalaska and St. Paul's Harbor and Ports inside the mouth of the Straits of Fuca. Not to use any inside passage on the west coast of America north of Comox, Vancouver Island, nor ports or places on the east coast of Asia north of Shanghai, nor Island adjacent thereto, except ports in Japan. Not to use ports and places on the coast of Mexico between July 1st and November 1st. Not to use Torres Straits nor any Guano Islands, nor to engage in any inter-island trade, nor to use any ports or places in the South Pacific Ocean situated between the Equator and latitude 30 degrees south, and between Longitude 120 degrees west and 155 degrees east between December 1st and March 31st, except Taiohai, Marquesas Island and Papeete Society Islands, nor to go on a whaling, fishing, sealing or trading voyage. It shall and may be lawful however for said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places if thereunto obliged by stress of weather or other unavoidable accident without prejudice to this insurance.

5th. Not to load more than net registered tonnage with Guano, Salt, Iron, Stone, Ore or Lime. Not to carry bituminous coal in bulk, except between ports in the Pacific Ocean. Not to carry Grain in bulk, nor to proceed to sea Grain laden, except coastwise, without a certificate from an Inspector appointed by Underwriters upon the hull of cargo stating that the vessel is properly laden and fitted for her intended voyage.

6th. This company is not to be held liable in general average or otherwise for jettison of deck cargo unless the vessel is stranded, nor for wages and provisions, except when the same are a general average charged by the custom of the port of destination; nor in case of insurance upon a steamer for any injury to the machinery or boilers, nor for loss or damage to the vessel itself caused by explosion of boilers, unless occasioned by stranding, striking the ground, sinking, burning or collision with another vessel; nor for fuel, wages or provisions, or expenses of delay consequent upon repairs of any kind on any steamer except in general average for wages and provisions of that portion of the crew absolutely necessary for the navigation of the vessel; nor for any claim for loss or expense arising from capture, seizure, detention, destruction, or the consequences of any attempt thereat by any hostile nation, or by any government, or by any officer, civil or military, claiming to act in its name or under its authority; nor by any insurgent or [112] revolutionary power (piracy excepted), anything herein to the contrary notwithstanding; also warranted not to aban-

don in case of blockade, and free from any expense in consequence thereof, but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

7th. In case of any loss or misfortune resulting from any peril insured against, the party insured hereby engages for himself or themselves, his or their factors, servants and assigns, to sue, labor and travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured or any part thereof, and also to use all proper and legal means to recover, through general average, or otherwise, from the parties interested in Freight or Cargo, either or both, any and all sums due to the vessel or its owners on account of sacrifices, losses or expenses, incurred for the general safety or the common good, to the charges whereof this company will contribute in proportion as the sum insured is to the whole sum at risk; nor shall the acts of the Insured or Insurers in recovering, saving and preserving the property, insured, in case of disaster, be considered a waiver or an acceptance of an abandonment.

Rate per
cent
5 8th. It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by the perils insured (except on Anchors, Copper and calking under the Copper), as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage, and their proceeds deducted from the gross loss. And it is especially agreed that, instead of deducting one-

third for new on the expense of re-metaling, including docking and calking, there shall be deducted two and one-half per cent of the cost of re-metaling, docking and calking, after deducting the value of the old metal and nails, for each and every month the metal shall have been on the vessel at the time when it is taken off; and if it shall have been on forty months or more, the cost shall be wholly borne by the Insured. In case the vessel shall be on a single bottom, the same rule shall apply to docking and calking, but one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured.

9th. It is also agreed that the insured shall
Prem- not have the right to abandon the vessel unless
ium
\$300. the amount which this company would be
liable to pay under an adjustment, as of
partial loss for labor and materials, (exclusive of
salvage or general average expenses and the cost
of funds), shall exceed half the amount hereby insured; and when the vessel is in a port or place where she can lie in safety, she shall in no case be sold for or on account of the insurers, until the estimated cost of repairs shall have been communicated to them and their consent to the sale obtained; and in case of the total loss of the vessel with salvage, the amount allowed out of the salvage to the officers and crew for wages earned or services rendered previously to the loss shall be considered as so much of the salvage applied to the use of the shipowners, even

though the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss.

10th. It is also agreed that no assignment of this Policy shall be valid unless the written consent of the Insurers be first obtained and endorsed hereon. In all cases of return of premium, in whole or in part, ten per cent upon the return premium is to be retained by the Insurers. [113]

11th. And it is agreed that in the event of the insured failing or refusing to pay the premium, or any premium note when due, that it shall be at the option of the Company at any time thereafter upon written notice to the insured or his agent, to declare this Policy to be null and void; but the insured shall remain liable for such proportion of the premium or premium note as corresponds with the expired time at the date of such notice.

12th. It is furthermore Hereby Expressly Provided and Agreed that no suit or action against this Company for the recovery of any claim upon, under or by virtue of this Policy shall be sustained in any Court of Law or Chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall have occurred; said period of twelve months to commence running from the time of such loss or damage, and not from the date when proofs of loss are made, or the amount of such loss or damage is ascertained, or any right of action under this Policy shall accrue; and in case any such suit or action shall be commenced against this Company after the expiration of

twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

13th. If there be an Agent of the Insurers located at or near any place where repairs are made, or proofs of loss or average taken, said Agent must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by this Company.

14th. In all cases of general average and/or salvage expenses, where the contributory value as stated in the adjustment, exceeds the value expressed in the policy, the liability of this Company shall be limited to the proportion which the amount insured bears to said contributory value.

(On margin)

It is agreed that, if the vessel hereby insured shall come into collision with any other vessel, and the insured shall in consequence thereof become liable to pay, and shall pay any sums not exceeding the value of the vessel hereby insured, in respect of injury to such other vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned upon such goods by such other vessel the insurers will pay the insured such proportion of three-fourths parts of said sums as the amount hereby insured bears to the value of the vessel hereby insured (but not exceeding in any event the amount of this policy). But this agreement is in no case to be construed as extending to any sums which the

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insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals, from any cause whatsoever.

Warranted not to carry coal or case oil from ports and/or places on the Atlantic Coast.

This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths ($\frac{3}{4}$) running down clause.

IN WITNESS WHEREOF, the FIREMAN'S FUND INSURANCE COMPAY has caused these presents to be signed by its duly authorized officers, in the city of San Francisco, State of California, this 17th day of April, One Thousand Nine Hundred and Eleven.

WM. J. DUTTON,
President. [114]

RULES FOR ADJUSTMENT OF LOSSES

Under this Policy.

Rule I.

Metal and Metaling.

The following items shall be considered as chargeable to the Metaling.

1. The metal and nails.
2. The paper or felt; both at their cost, delivered alongside or on board the vessel.
3. The labor of stripping off the old metal, and of punching and putting on the new, which is to be charged at the price actually paid therefor, when a separate bill for such labor can be procured. And in default of such separate voucher, the labor on the metal is to be estimated at the rate of thirteen (13)

sheets of metal to the day's work, as charged for in the calker's bill of labor.

4. The cost of picking up the old metal and packing the same for sale.

Patching Metal.

5. Patching metal and calking under the same, when more than twenty (20) sheets are used, shall be adjusted in the same manner, so far as relates to the copper clause in the Policy, as when the whole bottom is stripped and re-metaled. When less than twenty sheets are used, the patching and calking under the same shall be placed in the vessel column, one-third off.

Rule II.

Docking and Calking.

The clause making the cost of docking and calking chargeable to Underwriters in the same ratio as re-metaling, shall be construed and defined to mean:

1. That when a vessel is docked or hove out solely for the purpose of remetaling (or, if on a single bottom, or recalking), all the expenses attending the docking or heaving out and calking, including materials used therefor, shall be charged to owners at the rate of two and one-half per cent per month for every month that the metal shall have been on the vessel at the time when it is taken off, or, if on a single bottom, for every month intervening since she was last calked.

2. When a vessel is docked, or hove out for the two-fold purpose of remetaling, (or, if on a single bottom, recalking) and repairing keel or bottom, by reason of having collided or stranded, then the ex-

pense of docking or heaving out shall be proportioned *pro rata* upon coppering and (or) calking and other repairs, in the proportion of the number of days' work expended upon each respectively. The above rules shall also apply to wharfage, but no wharfage shall be allowed for, except when indispensably necessary to the repairing of the vessel.

3. In default of a separate bill for calking, the labor of reefing out the old oakum, picking, spinning and putting in the new and pitching the seams, is to be estimated at three and one-half ($3\frac{1}{2}$) days' labor to the bale of oakum used, and the time occupied and material used in recalking under the metal, shall be estimated at one-half of the time and material required for recalking the whole vessel exclusive of decks.

4. The expenses attending the calking above the metal shall be adjusted less one-third for new.

5. The expense of navigating and towing the vessel, to and from, and entered dock, including pilotage and wages and provisions of hands specially employed to navigate the vessel to and from the place of repair, shall follow the docking or heaving out as herein defined. But the wages and provisions of the regular crew of the vessel shall never be allowed for in particular average. [115]

Rule III.

Commissions.

All commissions actually paid in a foreign or domestic port shall be chargeable as heretofore to the various interests adjusted upon. But no other commission shall be chargeable against insurers on

disbursements in partial or salvage losses, nor in General Average, when ship and cargo belong to the same owners, nor in any other case when no such commissions have been actually paid, and when no charge therefor would be customary, or collectible in the ordinary course of the business of the insured, had no disaster occurred.

Rule IV.

Adjuster's Fees.

The Adjuster's fees in Particular Average, whether on vessel, cargo, or freight, shall be chargeable in the adjustment to the various interests adjusted upon, and shall be in proportion to the several amounts as apportioned therein.

Rule V.

Adjuster's Attitude.

The traditional and necessary attitude of an adjuster is that of a Referee and not that of an Attorney or Advocate. It is his duty, in all cases, to act with strict impartiality between insurers and insured, regardless of favor toward friend or employer, and intent solely upon the legal and clerical accuracy of his calculations. This rule shall be understood to be binding in cases of Particular Average, and in adjustments upon estimates for repairs, made with a view to compromise, with the same force as in cases of General Average.

Rule VI.

Surveys.

The insurers shall not be obliged to accept any adjustment on a vessel based upon a survey which omits to discriminate between the repairs attributed

only to the perils insured against, and such repairs as are due only to wear and tear, or to the original defects, natural decay, or depreciation of the vessel.

Rule VII.

Bills for Repairs.

When bills for repairs are presented, which include items indifferently specified chargeable partly to owners and partly to underwriters, and having no reference to discriminations in the survey, the adjuster shall require the claimant or master to separate the charges in accordance with the survey. Failing wherein, the adjuster shall refer the bill back to the maker thereof, with a request to separate the items, so as to correspond with the survey. Failing in both, it shall be the custom to charge the whole of the unspecified items to the "owner's" column.

[116]

Rule VIII.

Special Charges on Cargo.

When sacrifices are made or expenses incurred for the benefit of all concerned in ship and cargo, and by reason of loss or condemnation of the ship, the cargo is the only interest saved to contribute, the proper proportion of such losses shall be paid by insurers on cargo, as General Average losses, though adjusted under the name of Special Charges on Cargo; and notwithstanding that the goods may be insured "free of particular average."

Rule IX.

Appointment of Surveyors and Appraisers.

In all cases of Average, whether General or Particular, whether on Hull or Cargo, the selection and

appointment of Surveyors and Appraisers shall be agreed upon beforehand by and between the insured or claimants in average or their representatives of the insurers on the other; and the services of the persons so appointed shall be understood to be wholly disinterested as between all parties concerned. No representative or underwriters shall be expected to certify, approve or accept any surveys or appraisements made in contravention of this rule; but such documents shall be deemed to be wholly *ex parte* in character, and, as such, open to criticism, or liable to be rejected altogether.

In no case shall any ship-carpenter, rigger, or other mechanic who may have served on a survey, be employed to make the repairs, or any portion thereof.

Rule X.

Payment of Losses.

All losses shall be payable sixty days after proof and adjustment of loss and proof of interest, and if payment be anticipated, interest shall always be discounted for the time so anticipated, at the current rate of interest at the time of payment. Provided, however, that General Average claims and losses of other descriptions, amounting to less than five hundred dollars (\$500), may be paid, without discount, so soon as ascertained; and nothing herein contained shall apply to sums paid in compromise.

Rule XI.

Wages and Provisions in General Average.

The schedule of allowance for wages and provisions in General Average shall be fixed as follows:

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Wages: The actual wages paid, at the prices specified upon the articles.

Provisions:

For Masters.....\$1.50 per day

For Mates... 0.75 “ “

For Seamen and others..... 0.40 “ “

And the period for which wages and provisions shall be allowed, shall be from the day of bearing away for a port of distress, until the vessel is ready for sea. [117]

Rec'd copy of within Amended Complaint this 6th day of March, 1914.

BALLINGER, BATTLE, HULBERT &
SHORTS,

Attys. for Defendant.

[Indorsed]: Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 10, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [118]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Defendant.

Answer to Amended Complaint.

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court:

The answer of Fireman's Fund Insurance Company, a corporation, the above-named defendant, to the allegations of the amended complaint of The Globe Navigation Company, a corporation, the above-named plaintiff, admits, denies and alleges, as follows:

FIRST CAUSE OF ACTION.

I.

Defendant admits the allegations of paragraph I of the first cause of action. [119]

II.

Defendant admits the allegations of paragraph 2 of said first cause of action.

III.

Defendant admits the allegations of paragraph 3 of said first cause of action.

IV.

Answering unto the allegations of paragraph 4 of said first cause of action, defendant alleges that it has no actual knowledge in respect thereto, but admits that it has been informed that the incidents therein set forth actually occurred, and at the same time demands that strict proof be made thereof.

V.

Defendant admits the allegations of paragraph 5 of said first cause of action.

VI.

Answering unto the allegations of paragraph 6 of

said first cause of action, defendant denies that, on October 14, 1911, The Globe Navigation Company gave to Fireman's Fund Insurance Company, at Seattle, Washington, notice that the schooner "Wm. Nottingham" had been dismasted in a severe storm, had become water-logged and been abandoned by her officers and crew, or that she was a derelict on the Pacific Ocean somewhere off the mouth of the Columbia River, or any other place, or that said Globe Navigation Company surrendered and abandoned said schooner, in her derelict condition, to said Fireman's Fund Insurance Company, to do with as it thought best, and denies that said Globe Navigation Company [120] had any other communication of like tenor and effect with said Fireman's Fund Insurance Company on said day.

VI½.

Answering unto the allegations of paragraph 6½ of said first cause of action, defendant admits that, on October 16, 1911, The Globe Navigation Company gave to the Fireman's Fund Insurance Company a written notice of its abandonment of said schooner to said Insurance Company, and that said notice was in writing, and that a copy of said notice is attached to said amended complaint, marked exhibit "B." Defendant denies, however, that said written notice of abandonment was given on said date, or at all, to confirm any verbal notice of abandonment made on October 14, 1911, and specifically denies that any verbal notice of abandonment was given on October 14, 1911, or that any notice of abandonment was given to said Fireman's Fund Insurance Com-

pany, other than that of which said exhibit "B" is a copy.

VII.

Defendant admits the allegations of paragraph 7 of said first cause of action.

VIII.

Defendant admits the allegations of paragraph 8 of said first cause of action.

IX.

Answering unto the allegations of paragraph 9 of said first cause of action, defendant admits that it was mutually agreed between the parties in interest, including the parties to this action, that said schooner should be [121] relieved of the salvage claims of the said salvage libelants, together with the expenses necessarily incurred in said salvage proceedings, and admits that it has knowledge that the sum of three thousand (3,000) dollars was paid the port of Portland for salvage claims of libelants, and that while it has been informed that certain sums of money were paid by plaintiff on account of the other items set forth in said paragraph 9, defendant has no actual knowledge thereof, and for that reason denies the same, and demands that strict proof be made of each and every item therein contained. Defendant denies the remaining allegations of said paragraph.

X.

Defendant denies each and every of the allegations of paragraph 10 of said first cause of action.

XI.

Defendant has no knowledge or information as to

the truth of the allegations of paragraph 11 of said first cause of action, and for that reason denies the same, and demands strict proof thereof.

XII.

Defendant denies each and every of the allegations of paragraph 12 of said first cause of action.

XIII.

Defendant admits that all and singular the premises are within the admiralty and maritime jurisdiction of this Honorable Court, and that said defendant is within its jurisdiction, but denies that all and singular the premises are true. [122]

SECOND CAUSE OF ACTION.

I.

Defendant admits the allegations of paragraph I, of the second cause of action contained in said amended complaint.

II.

Defendant admits the allegations of paragraph 2, erroneously designated as paragraph 3, of said second cause of action.

III.

Answering unto the allegations of paragraph 3, erroneously designated as paragraph 4, of said second cause of action, defendant reiterates its answers to paragraphs 4, 5, 6, 6½, 7, 8, 9, 10, 12 and 13 of said first cause of action, and hereby makes its said answers to said paragraphs, the denials, allegations and demands of proof therein contained, answers unto paragraph 3 of said second cause of action and to the paragraphs of said first cause of action repeated in and made a part of said paragraph 3 of

said second cause of action, with the same force and effect as if set forth at length herein.

Further answering unto the allegations of said amended complaint, defendant alleges:

I.

That when plaintiff served upon defendant the so-called notice of abandonment, marked exhibit "B" and attached to said amended complaint, defendant then refused, [123] and ever since has refused, to accept said abandonment; and that no sufficient grounds existed for abandoning said schooner "Wm. Nottingham" to defendant under the terms and conditions of said policies of insurance referred to in said amended complaint.

II.

That, at the time defendant filed its answer to the original complaint herein, it admitted that it would be liable, under its policies of insurance, covering on said vessel, for its proportion of general average and salvage charges accruing from the preservation of said vessel and cargo, but that the amount thereof was at that time unknown; that since the filing of said answer the firm of Johnson & Higgins, in San Francisco, California, who had been appointed by plaintiff to adjust the general average arising on said voyage, has completed said adjustment; that in and by said adjustment the amount due in general average, including all salvage charges and expenses incurred by said vessel, from defendant, under its aforesaid policies, was the sum of thirty-five hundred and thirty-nine and 38/100 (3,539.38) dollars; that defendant has heretofore paid plaintiff said

sum of thirty-five hundred and thirty-nine and 38/100 (3,539.38) dollars, and thereby fully discharged all of its liability for general average and salvage losses under said policies.

III.

That said schooner "Wm. Nottingham" was unseaworthy at the time she started upon said voyage mentioned in said amended complaint, in that she was leaky and her pumps were [124] not in working order, so that the same could be used to keep said vessel free from water which entered her hull through said leaky condition, and that by reason thereof said vessel commenced to leak and became water-logged in fair weather, immediately after starting upon said voyage; that all losses and damages suffered by said vessel upon said voyage were caused and occasioned by the aforesaid unseaworthiness of said vessel.

WHEREFORE, defendant prays that the action herein be dismissed, and that it may recover its costs and disbursements herein incurred.

IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT &
SHORTS,

Attorneys for Defendant.

Postoffice address:

901 Alaska Building,
Seattle, Washington. [125]

State of Washington,
County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath deposes and says:

That he is the general agent of Fireman's Fund

Insurance Company for the State of Washington, and as such general agent makes this verification for and on behalf of said corporation:

That he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

FRANK G. TAYLOR.

Subscribed and sworn to before me this 24th day of March, 1914.

[Seal] BRUCE C. SHORTS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Due service of the within Answer admitted this 24th day of March, 1914.

CLISE & POE,
Attys. for Plaintiff.

[Indorsed]: Answer to Amended Complaint.
Filed in the U. S. District Court, Western Dist. of
Washington, Northern Division. Mar. 31, 1914.
Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.
[126]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a
Corporation,

Defendant.

Reply.

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court:

Now comes the plaintiff in the above-entitled action and replies to the affirmative matter contained in the answer of said defendant, as follows:

I.

It admits that the defendant refused to accept the abandonment of the said schooner made by plaintiff, but denies each and every other allegation contained in the first paragraph of said affirmative matter.

II.

It admits that defendant has paid plaintiff the sum of three thousand five hundred thirty-nine and 38/100 dollars (\$3,539.38), and admits that Johnson & Higgins, of San Francisco, has made an adjustment in general average arising on said voyage, but denies each and every other allegation contained in paragraph two of said affirmative matter.

III.

It denies each and every allegation contained in paragraph three of said affirmative matter. [127]

WHEREFORE, plaintiff prays as in its amended complaint on file herein.

CLISE & POE,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

George F. Thorndyke, being first duly sworn, on oath, deposes and says: that he is the manager of the Globe Navigation Company; that he has read

believes the same to be true.

the foregoing reply, knows the contents thereof and

GEORGE F. THORNDYKE.

Subscribed and sworn to before me this 31st day
of March, 1914.

H. R. CLISE,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within reply received this 31st day of
March, 1914.

BALLINGER, BATTLE, HULBERT &
SHORTS,

Attorneys for Defendant.

[Indorsed]: Reply. Filed in the U. S. District
Court, Western Dist. of Washington, Northern Di-
vision. Apr. 13, 1914. Frank L. Crosby, Clerk.
By E. M. L., Deputy. [128]

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*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2156.

THE GLOBE NAVIGATION COMPANY, a Corpo-
ration,

Plaintiff,

vs.

FIREMEN'S FUND INSURANCE COMPANY, a
Corporation,

Defendant.

To the Honorable Judges of the Above-entitled
Court:

Pursuant to the order of reference herein and stipulation of counsel, I proceeded with the hearing of testimony on this 30th day of July, 1913. The plaintiff appearing by Mr. H. R. Clise and Mr. Wm. H. Bogle, its attorneys; the defendant appearing by Mr. Ira A. Campbell, of counsel for said defendant. Thereupon the following proceedings were had and testimony offered:

Plaintiff's Testimony.

Mr. CLISE.—I want it stipulated in the record that you admit the allegations contained in paragraphs 9 and 11 of the complaint.

Mr. CAMPBELL.—I will admit that amount of money was paid to the Port of Portland for the purposes stated in paragraph 9, it being understood, however, that that payment was without prejudice to the rights of either party in this litigation.

Mr. CLISE.—You admit the truth of paragraph 11?

Mr. CAMPBELL.—Yes, sir.

Mr. CLISE.—I offer in evidence the original policy of insurance to the Globe Navigation Company. It is agreed that that [131] is the original policy?

Mr. CAMPBELL.—Yes, sir.

Paper marked Plaintiff's Exhibit "A," filed and returned herewith.

Mr. CAMPBELL.—There is a second policy.

Mr. CLISE.—You admit that the other policy is an exact duplicate?

Mr. CAMPBELL.—I would like to see the second policy.

Mr. CLISE.—The policy I set up is a copy furnished me by Mr. Taylor and you admit that in your pleadings. Now, I am introducing one of them. The one alleged in the second cause of action is an exact duplicate of the first, except that the loss is payable to the Globe Navigation Company.

Mr. CAMPBELL.—We will ask for the production of the original policy. We would like to see the original, if you can procure it. We are willing to have a copy of it substituted in the record so that it may be returned, but we would like to have the right to inspect it. If the policy is lost we would make no point of that; if it is in existence we would like to see the original. [132]

[George F. Thorndyke, for Plaintiff.]

GEORGE F. THORNDYKE, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

(Testimony of George F. Thorndyke.)

Q. (Mr. CLISE.) Mr. Thorndyke, state your name, age, business and residence.

A. George F. Thorndyke; shipping business, manager of The Globe Navigation Company; residence, Seattle; age, 47.

Q. How long have you been manager of the Globe Navigation Company, Limited?

A. Six or seven years.

Q. How long have you been connected with The Globe Navigation Company?

A. Twelve years.

Q. In what capacity?

A. Traffic manager and then manager.

Q. How long have you been engaged in the shipping business? A. Twenty years.

Q. Where?

A. Mostly Puget Sound and Alaska—Pacific Coast.

Q. When did you first know of the disaster to the schooner "Wm. Nottingham"?

A. On Saturday afternoon, I think, October 14th, 1911.

Q. How did you receive that information?

A. I received a telephone from Plummer of the Puget Sound Tug Boat Company. He stated that he had received a report from the master of his tug off the Columbia River, that the "Nottingham" had been dismasted, water-logged and abandoned at sea, and that the master and crew were on board the schooner "David Evans," bound for the Columbia River.

(Testimony of George F. Thorndyke.)

Q. You say that was contained in a telegram?

[133]

A. He said it was a telegram. This came verbally to me over the telephone.

Q. Did you receive any dispatch from the captain with reference to it? A. No.

Q. (Showing paper to witness.) Do you wish to change that? A. Yes, I will.

Q. Is that the dispatch you received from the master? A. Yes, sir.

Q. Is A. W. Swenson the master of the "Nottingham"?

A. Yes. That was afterwards; that was not the first information I had.

Q. Do you remember what day of the week October 14th was?

A. I think it was Saturday afternoon. I know the time I got my information was Saturday afternoon. I remember that.

Q. Did you notify the Firemen's Fund Insurance Company of the accident?

A. I do not remember whether I communicated with Taylor that afternoon or not. I did notify them later.

Q. Was that notification verbal or in writing?

A. In writing.

Mr. CLISE.—Do you admit that this is a copy of the notification, Mr. Campbell? You have the original; this is a carbon copy.

Mr. CAMPBELL.—We admit the receipt of the original—if that is a carbon copy.

(Testimony of George F. Thorndyke.)

Q. I show you a paper and ask you if that is a carbon copy of the notice you gave to the Firemen's Fund, of the disaster to the "Nottingham"?

A. Yes, sir. [134]

Mr. CLISE.—I offer this telegram in evidence.

Paper marked Plaintiff's Exhibit "B," filed and returned herewith.

Mr. CLISE.—I also offer this notification in evidence.

Paper marked Plaintiff's Exhibit "C," filed and returned herewith.

Mr. CLISE.—I offer in evidence a certified copy of the wreck report made by the master to the Collector of Customs at Astoria.

Mr. CAMPBELL.—We have no objections to it on the ground that it is a certified copy, but do not admit the truth of the statements made in the report.

Paper marked Plaintiff's Exhibit "D," filed and returned herewith.

Q. When did you first see the schooner after her reported abandonment to you?

A. On the 18th of October.

Q. Where did you see her? A. Astoria.

Q. 18th of October, 1911?

A. Yes, following the accident.

Q. In whose possession did you find the schooner at that time?

A. A watchman who represented himself to be in charge of the vessel for the tug-boat crew that salved her. He was previously a member of the crew of the tug that salved her.

(Testimony of George F. Thorndyke.)

Q. What was the condition of the schooner when you first saw her?

A. She was pretty badly wrecked. She was dismasted. All [135] three aftermasts, the foremast alone standing. Her foretopmast gone. All the sails. All the three aftermasts, the main mizzen and spankermast gone. And all the gear, chain plates twisted and broken off. Deckload had gone down to even with the rails, about even with the rails. The ship had the appearance of being waterlogged. She was deep in the water. The cabin had been gutted by sea water and partitions broken or taken out. Cabin furnishings destroyed. Crew quarters, galley and all quarters in under the fore-castle-head demolished and destroyed.

Q. Were you permitted to go aboard of her when you went to Astoria?

A. When I went to Astoria, but when in Portland I was told to get a permit or I would not be allowed aboard the vessel. The getting of an order from the Court. I was told that I could get a permit from Messrs. Wood & Linthicum. I met Col. Wood and he directed a letter to the watchman aboard the vessel to allow me to go aboard.

Q. (Mr. CAMPBELL.) That is, the salvors of the vessel were the ones that would have prevented you going aboard?

A. The owners of the tug that salved her, the Port of Portland.

Q. The insurance company did not object to your going aboard? A. Oh, no.

(Testimony of George F. Thorndyke.)

Q. (Mr. CLISE.) What was the condition of the schooner, as far as being filled with water or not, at that time?

A. Well, you could not see the hold because she had sufficient lumber on deck, and we did not sound the pumps. But she had every appearance of being water-logged, or nearly so. She was, in my judgment, too deep in the water to be so [136] affected by the deck-load or cargo in the hold and what little she had on deck.

Q. Did the appearance of the schooner itself indicate whether or not she had been deeper in the water than she was at the time you saw her?

A. Oh, yes. She had been deeper at some time.

Q. Were any statements made to you as to how the schooner came to be in the condition she was at the time you saw her?

A. Not at that time. There was only the watchman aboard. At that time the captain of the vessel was with us and he told us she had been in a gale.

Mr. CAMPBELL.—I object to any conversation with the captain.

Mr. CLISE.—You may omit that.

Q. Did anybody accompany you when you first visited the schooner? A. Yes, sir.

Q. Who?

A. Swenson, Mr. Walker and Captain Crow.

Q. How long did you remain on the schooner this first time? A. I should say nominally an hour.

Q. When did you again see the schooner?

A. Oh, I saw her frequently, at various times,

(Testimony of George F. Thorndyke.)

after that. I think the next time I did see her was at St. Johns, after she had been removed from Astoria to St. Johns.

Q. What facilities has the port of Astoria to store cargo or repair a vessel of this kind? A. None.

Q. How did the schooner happen to be removed from Astoria to St. Johns? [137]

A. Well, she was moved there for the purpose of discharging cargo and docking her to see her bottom and determine the whole damage; the result of an agreement with all concerned.

Q. How far was it from Astoria to St. Johns?

A. Nominally 100 miles.

Q. Up the Columbia River?

A. Up the Columbia River.

Q. When you saw the vessel at St. Johns was she in the drydock or not?

A. I saw her in the drydock at St. Johns.

Q. Describe her condition when you saw her there.

A. Her condition along the decks in regard to her rigging, chain-plates and damages above before spoken of, was the same. On the dock we discovered that the port side, her garboard strake was chafed and bruised somewhat, slightly, for pretty nearly its entire length. Otherwise than that there did not appear to be any material damage to her hull.

Q. In whose possession was the schooner all this time? A. The Port of Portland, the salvors.

Q. Did you have the vessel surveyed then at St.

(Testimony of George F. Thorndyke.)

Johns? A. Yes, sir.

Q. Who surveyed her?

A. Mr. Walker and Captain Crow.

Q. Mr. Walker submitted a written survey and specifications? A. Yes, sir.

Q. Based on that survey and specifications, did you call for bids to repair the "Nottingham"?

A. We did.

Q. How many bids did you receive? [138]

A. Four.

Q. I hand you a paper purporting to be the letter-head of the Oregon Drydock Company, dated January 12, 1912, and ask if that is one of the bids that you received. A. Yes, sir, that is one of them.

Q. What is the amount that they offered to repair the vessel, according to specifications, for?

A. \$25,200.

Mr. CLISE.—I offer this paper in evidence.

Paper marked Plaintiff's Exhibit "E," filed and returned herewith.

Q. I hand you a paper purporting to be a bid of the Albina Engine and Machine Works, dated January 12, 1912, and ask if that is one of the bids received. A. Yes, sir, one of them.

Mr. CLISE.—I offer this in evidence.

Paper marked Libelant's Exhibit "F," filed and returned herewith.

Q. I hand you a paper purporting to be a bid from the St. Johns Shipbuilding Company and ask if that is one of the bids received. A. Yes, sir.

Q. In what amount is that? A. \$23,070.75.

(Testimony of George F. Thorndyke.)

Mr. CLISE.—I offer this in evidence.

Paper marked Plaintiff's Exhibit "G," filed and returned herewith.

Q. I hand you a paper purporting to be a bid from the Vulcan Iron Works and ask you if that is one of the bids received by you. [139] A. Yes, sir.

Q. How much is that? A. \$24,600.

Mr. CLISE.—I offer that bid in evidence.

Paper marked Plaintiff's Exhibit "H," filed and returned herewith.

Q. How much was the Albina Engine Works bid?

A. \$20,950.

Q. Did you advise the defendant in this action, the Firemen's Fund Insurance Company, of the receipt of these bids and furnish them copies?

A. I do not remember that I furnished them copies. But Captain Crow and, I think, Mr. Hewett knew of the bids and were familiar with them.

Q. Who is Mr. Hewett?

A. He was with the Firemen's Fund in Portland.

Q. You mean he was agent or representative there?

A. I do not remember whether he was their agent. I think he was with them. I think they had another representative there. I think he was prominent in their business.

It is admitted that Henry Hewett was the agent and representative in Portland of the Firemen's Fund Insurance Company.

Q. Do you know the responsibility and general reputation of the parties making these various bids?

(Testimony of George F. Thorndyke.)

Mr. CAMPBELL.—I object as incompetent, irrelevant and immaterial, so long as the parties making the bids complied with the call for bids by tendering a Surety Bond required by the call, or agreemnet to furnish a bond required by the call.

[140]

A. I did not investigate the Oregon Drydock people particularly, because their bid was very high, but I did make inquiries regarding the St. Johns Ship Building Company, and the Albina Engine Works.

Q. When the bid of the Albina Engine & Machine Works was delivered to you, or rather, first, who delivered it to you?

A. A man by the name of Cornfoot.

Q. It is signed William Cornfoot, proprietor?

A. Yes, sir.

Q. Did he make a statement to you at the time he delivered it to you? A. Yes, sir.

Q. What was that?

Mr. CAMPBELL.—I object as incompetent, irrelevant and immaterial and as hearsay.

A. He met me in the lobby of the Oregon Hotel and presented his tender, which was the lowest one that was submitted, and he had with him a man named Mackintosh, Robert Mackintosh, and Cornfoot said, "You will understand that I am simply running the engine works," I think he said on the East side, "and I really have no interest in taking this contract, because there is no considerable amount of the work in connection with this damage,

(Testimony of George F. Thorndyke.)

that would be in my plant, but I intend this for Mackintosh who will have charge of all the work, and will be the man you will look to for the details and that sort of thing."

Q. Did you know Mackintosh?

A. I had met him before, yes.

Q. Did you know what his reputation was in regard to doing [141] work of this character?

Mr. CAMPBELL.—This goes to your knowledge of his reputation?

A. Only from hearsay, reputation, what I had heard. I had heard that he was irresponsible. He had taken other work in Portland and had failed or had been dismissed from it before it was finished, and the owners, or others than himself had finished the work, the owners of vessels.

Q. Was there any offer made at this time to furnish a bond or any bond whatsoever by the Cornfoot outfit?

A. I think he stated that he could furnish a bond if we required it. He did not give me a bond at that time.

Q. Now, if you had been the owner of this vessel or representing the owner of this vessel, if there had been no insurance, would you have accepted this bid by the Albina Engine & Machine Works to repair this vessel? A. Not in the way it was tendered.

Mr. CAMPBELL.—I object as incompetent, irrelevant and immaterial, and as constituting no basis on which, under the terms of the policy, abandonment for constructive total loss can be founded.

(Testimony of George F. Thorndyke.)

Q. You say you would not have accepted this bid?

Mr. CAMPBELL.—I renew my last objection.

A. I would have been fearful of complications and litigation. I would rather pay a thousand or so dollars more to the man that had a good reputation and was competent to do the work .

Q. Acting as the representative of owners of this vessel carrying no insurance, which of these bids would you accept?

Mr. CAMPBELL.—I renew my last objection.
[142]

A. St. Johns Ship Building company.

Q. In the first paragraph of the complaint in this action, there is an allegation that in addition to the amount that you expended for salary as shown by paragraph nine of the complaint, you expended a further sum of \$2452.45. Will you state in detail what constitutes the items making up that sum? You may use this memoranda to refresh your memory.

A. "Crew paid off.....	\$547.17
Shipping Commissioner.....	2.50
Commission to agent.....	5.70
Trip to Astoria, Oct., railroad company	37.50
Railroad fare, meals, berth, etc.	
Trip Oct. 25, 27,.....	33.20
Oregon Railway & Navigation Co.,....	56.70

Q. What was that for?

A. I think that was fares for yourself and myself when we went to Portland.

Long-distance phone.....	\$ 2.30
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(Testimony of George F. Thorndyke.)

Telegrams	11.15
V. Boelting, protest.....	5.00
Northern Pacific Railway	15.20
Railroad Company, trip to San Fran-	
cisco.....	107.00
Trip to Portland	72.60
Clise, trip to Portland and services....	55.50
Clise, trip to San Francisco and	
telegrams.....	188.00
telegrams.....	3.00
Thorndyke 2 trips to Portland in Dec..	51.40
Marshal's Fees.....	4.00
Telegrams for December.....	8.23 [143]
Telegrams and long-distance phone for	
Jan.....	4.43
Thorndyke trip to Portland.....	34.43
Captain A. Swenson for personal ex-	
penses account Mr. Brown and self	
for Nov. Dec. and January.....	592.40
One sixth of Port of Portland and	
other claims settled Feb. 8th.....	995.15

Total.....\$2832.33

Mr. CAMPBELL.—I move to strike the answer on the ground that the specifications of the items are indefinite, and a large part of the items are not chargeable in general average.

Q. Take the first item, Mr. Thorndyke, crew paid off, \$547.17. What time does that cover?

A. The time that the crew and officers had joined the vessel until such time as they arrived back in Astoria.

(Testimony of George F. Thorndyke.)

Q. Can you give the dates that would cover?

A. I cannot say, but I should think it was a day or two before the vessel sailed.

Q. When was that?

A. Sometime prior to the 10th day of October. It was about five or six days of October. Sometime prior to the 10th of October. It was probably about the first of October.

Q. Until what date?

A. Until the 14th or 15th of October, I think.

Q. 1911?

A. And the vessel may have sailed from Astoria on the second. She may have sailed from Westport two or three days prior to that.

Q. The complaint alleges that she sailed from Westport on the 2d of October. Now, about this item of \$2.50 paid [144] the shipping commissioner. What was that for?

A. That is an expense item customarily paid the shipping commissioner when he goes from his office to some near place to pay off or sign on a crew.

Q. Was this for paying off or signing on?

A. This was for paying off.

Q. Commission to agent \$5.70?

A. That I cannot explain. I think that is for expenses of telegrams, etc. We had business every day in Astoria and Westport, at the time the "Nottingham" was at Astoria.

Q. Well, at what time were these telegrams sent?

A. After the vessel arrived in Astoria in her damaged condition.

(Testimony of George F. Thorndyke.)

Q. Now, you say, trip to Astoria. You have got here the 17th and 18th of October, Mr. Thorndyke. Tell me generally what that was for?

A. Railroad fares, berth, meals, etc.

Q. This was the trip that you made to inspect the vessel about which you testified, after being notified of the disaster to the ship?

A. Yes, sir.

Q. Then you have a trip to Portland, October 25th and 27th, \$33.20. What was the occasion for that trip?

A. I think it was in connection with the "Nottingham" matters. I may have visited the vessel at that time. It may have been the time it was docked, very likely was at the time we docked the vessel; railroad fares, berth and meals. I was going to see or consult with the attorney for the Port of Portland.

Q. During all this time you were in constant communication [145] with the Firemen's Fund?

A. Almost constantly with Mr. Taylor.

Q. Do you know what the Port of Portland libeled the schooner for, what sum of money?

A. Something over thirty thousand dollars, as I remember, or about thirty thousand dollars.

Q. Were you in communication with the attorneys for the Port of Portland, either personally, or through your attorneys, with regard to obtaining a release of the vessel or putting up a bond, all of which had been communicated to the Firemen's Fund?

A. I think so.

(Testimony of George F. Thorndyke.)

Q. Then you have an item of \$56.70, Oregon Railway & Navigation Company. What do you understand that is for? A. That was for fares.

Q. From where to where?

A. Between Seattle and Portland.

Mr. CLISE.—I will pass these items for the present.

Q. You have stated already that on receipt of this notification from Mr. Plummer, you notified the representative of the Firemen's Fund here in Seattle, on Saturday afternoon, October 14th, 1911?

A. Yes, I think Mr. Taylor and I exchanged telephones that afternoon.

Q. How closely thereafter did you keep the Firemen's Fund advised of what you were doing?

A. Oh, almost daily I guess, for a while.

Q. How did you happen to make the trip to San Francisco on this matter?

A. I went there for the purpose of agitating the matter of [146] settlement with the underwriters and if possible avoid this litigation.

Q. Now, was there any request made from the Firemen's Fund that you should go there?

A. I think I was informed that Mr. Levinson would be glad to see you and myself.

Q. Who is Levinson?

A. I think he is manager and treasurer of the Firemen's Fund. Head of the affairs of the Firemen's Fund, in San Francisco, I believe.

Q. Now, you have spoken of Captain Crow accompanying you to the vessel. How often did he

(Testimony of George F. Thorndyke.)

accompany you in your examination of the "Nottingham"?

A. I do not remember his going to the "Nottingham" but once after that and that was the day she was docked.

Q. Did you have any conversations or communication with Captain Crow in the matter?

A. Oh, yes, various communications or conversations.

Q. Who was Captain Crow?

A. He was surveyor for the San Francisco Board of Underwriters in Portland.

Q. Was he representing the Firemen's Fund in this matter or not?

A. I understand so, as surveyor. [147]

Cross-examination:

Q. (Mr. CAMPBELL.) Mr. Thorndyke, who was it that said Mr. Levinson would be glad to see you?

A. I think Mr. Lebogeaux or—

Q. He was your agent? A. No.

Q. Who was Mr. Lebogeaux?

A. He was with or head of the firm of Johnson-Higgins & Co. on this coast.

Q. Who is Johnson-Higgins?

A. Insurance brokers and marine adjusters.

Q. They were the people that acted as brokers for you in placing this insurance? A. I think not.

Q. They were the people who made up the average adjustment? A. Yes, sir.

Q. What you went down there for was to endeavor

(Testimony of George F. Thorndyke.)

to arrange with the Firemen's Fund for a settlement, without prejudice to the rights, either of your company or the Firemen's Fund, of the salvage claim that was being put forward by the Port of Portland, was it not?

A. I think that was not taken up at that time.

Q. Was not that the primary purpose of that visit?

A. I do not remember it so. I think we felt we had a claim there for damages, the loss of the vessel, and we wanted to discuss the whole subject with a view of getting a settlement.

Q. The Firemen's Fund had declined to accept the abandonment that you had tendered to it?

A. Oh, yes. [148]

Q. Have you with you the specifications and the call for the bids? A. I did at the time.

Q. Have you them with you now?

Mr. CLISE.—I have a set of the specifications and survey. I intended to offer them in evidence when I put Mr. Walker on the stand.

Q. Who prepared the call for the bids, you or Mr. Walker?

A. I have forgotten whether Mr. Walker or myself or Captain Crow. I think Captain Crow told us who were responsible people, and told us the names of some of the firms to refer the matter to. I do not believe we called for any tenders, otherwise than on one of my visits there I submitted the specifications to these firms and asked them for a tender.

Q. Captain Crow, you say, gave you the names of

(Testimony of George F. Thorndyke.)

the responsible parties in Portland who might bid on the repairs for this vessel?

A. He gave me the names of some parties in Portland who might bid on this vessel.

Q. You delivered these specifications to these parties and asked for a bid?

A. As I remember, yes. Whether I gave it to all that he gave me the names of or not I do not know. I do not know that I gave it to all the names he submitted to me.

Q. But among the parties that you did give the specifications to and ask for bids, were these parties whose bids you have identified, and which have been offered in evidence?

A. We gave them the specifications.

Q. And asked for a bid on the specifications?
[149]

A. Yes, sir.

Q. These specifications were for the repair of the damage to the vessel which resulted from this trouble at sea? A. Yes, sir.

Q. You say these specifications were made up by Mr. Walker, your surveyor?

A. Yes, made by Mr. Walker.

Mr. CLISE.—Here is the call for bids. (Showing paper to counsel.)

Q. Was there not another call for bids, other than what is contained under the terms and conditions and the specifications?

A. Yes, I think there was a communication on our letterhead a brief letter.

(Testimony of George F. Thorndyke.)

Q. I will have you look at this letter, which is at the head of the specifications, and see if you recollect having sent that out together with the specifications?

A. Yes, I think that is what I had in mind. It was not addressed to the various firms but simply attached.

Q. Simply addressed to all who might bid?

A. It was not addressed to them at all. The specifications were enclosed in an envelope or handed to them and it was attached to the specifications.

Q. Do you recollect having sent that letter out with the specifications?

A. We sent a letter along. This type is different than ours.

Q. Will you read it over and state whether you recollect sending out a letter in substance the same as this one?

A. Yes, I think that is the same as the one attached to the specifications we sent out.

Mr. CAMPBELL.—I offer this letter in evidence. [150]

Paper marked Defendant's Exhibit "1" filed and returned herewith.

Mr. CAMPBELL.—Have you, Mr Clise, the supplementary report of Mr. Walker, dated March 4th and March 27th, which I requested this morning?

Mr. CLISE.—I have it here.

Q. When was the "Nottingham" last docked before this trouble in October 1911?

A. In April that year.

Q. When was she last caulked?

(Testimony of George F. Thorndyke.)

A. I could not say at this time.

Q. Was her bottom caulked at the time of that docking? A. No, I think not.

Q. Can you refer to your records and ascertain for me when she was last caulked?

A. Undoubtedly.

Q. Will you do so and furnish me with the date?

A. Yes, sir.

Q. Do you know the exact date in April when she was last docked?

A. I can ascertain it. I have a voucher for the expenses.

Q. Do you recollect when her bottom was last painted? A. At that time.

Q. At the time she was docked? A. Yes, sir.

Q. Where was she docked?

A. Docked, as I remember it, in Sidney.

Q. New South Wales? A. Yes, sir.

Q. And proceeded from Sidney to Portland, direct? [151] A. Yes, sir.

Q. To load outward again on this voyage in question? A. Yes, sir.

Q. When was she last resalted before the trouble in October, 1911?

A. That I could not say. We salted the vessel at various times.

A. Can you tell from your statement?

A. Well, I can tell when she was salted the last time before that, after she was returned from the east, from her Atlantic voyage.

Q. What date was that?

(Testimony of George F. Thorndyke.)

A. We had a new plank on her and she was opened up and we filled her with salt, that is filled all the top courses.

Q. What date was that?

A. I will say 1908, about that.

Q. Can you ascertain that date?

A. Yes, sir.

Q. Will you do so.

A. Yes, sir. If you will allow me to go back. I will change my testimony: The vessel was recaulked in East Boston at the time of this Atlantic voyage in 1907.

Q. You can ascertain that date for us?

A. Yes, sir. Nine thousand dollars was expended on the vessel at that time.

Q. You say you received no letter from the master detailing the trouble that he passed through after leaving Astoria in October?

A. I do not remember it, and I could not find anything about it. So much was carried on by telephone. I think I waited [152] a good while, until the official statement to the adjusters. But I may be mistaken as to that. But I have not been able to locate it.

Q. Who was the adjuster that received that statement? A. Mr. Becket.

Q. Of Johnson & Higgins?

A. As I remember it.

Q. In Seattle?

A. Yes, in Seattle. He made a statement of it. I know it was customary to take captains in to him.

(Testimony of George F. Thorndyke.)

Q. She was docked on the Port of Portland's dock at St. John's? A. Yes, sir.

Q. That was December, 1911? A. Yes, sir.

Q. Do you remember Mr. Cornfoot of the Albina Engine Works calling on you at the Oregon Hotel?

A. Yes, sir.

Q. At the time he submitted his bid to you?

A. Yes, sir.

Q. Do you recollect his having produced to you a letter at that time from a surety company, in which the surety company stated that it would furnish a bond as called for in the specifications or call for bids?

A. I remember something, Mr. Campbell, but as it is in my mind now, it was a letter from some trust company or bond company, and it was referring to one party and the tender was signed by another party.

Q. Do you remember such a letter being produced to you by Mr. Cornfoot? [153]

A. I think there was a communication, something of that sort.

Q. Do you recollect at that time Mr. Cornfoot stating to you that he would repair the vessel in forty days for an additional one thousand dollars over and above his bid? A. I do not remember that.

Q. You would not say that he did not?

A. No, I would not say that he did not. I do not remember.

Q. She was towed to the dock of the Port of Portland in December 1911, was she not?

(Testimony of George F. Thorndyke.)

A. I think so.

Q. And she was not removed from there until subsequent to May of 1912? A. That is a fact.

Q. During that period did you maintain a man aboard the ship or was she watched from the dock itself?

A. We kept the master and mate up there a long time after the vessel arrived at St. Johns.

Q. That was into February, was it not?

A. I do not remember now.

Q. And then what?

A. Then we wanted to put the master in another vessel. And the mate wanted to leave our employ and seek other employ, and I made an arrangement with the dock master Johnson to care for the vessel for a short period. Then afterwards I sent a man from Seattle, Howell by name, to live on board the vessel.

Q. That was subsequent to May, was it not?

A. I should think so. I would not state definitely; but he was on there during last summer, I know [154]

Q. When did you bring her to Seattle?

A. I should judge September or October last; may be a month or so before. These things are not very well fixed in my mind now.

Q. You let the master go about the 6th of February, didn't you?

A. It might have been as early as that.

Q. You furnished a statement of his wages during that period to Johnson & Higgins, who made up the

(Testimony of George F. Thorndyke.)

average adjustment, didn't you?

A. I don't know; the adjustment will show for itself.

Q. Now, during the interim, from the time she was taken from the Port of Portland until after May, she was exposed to the weather, without having her decks wet down or her sides wet down, was she not?

A. During what period?

Q. During the time after she was taken to the Port of Portland dock until after May?

A. Oh, no. She had the hose stretched all the time, the decks were wet and washed down frequently.

Q. Did you see it?

A. I saw the arrangement there for the hose suction-pipe overboard over the side.

Q. Did you see her wet down at all?

A. I think I did.

Q. How many times did you visit that vessel from the time she was docked in December up until May?

A. I would not state now; I would not attempt to state.

Q. Not more than two or three times, did you?

A. I would not state. [155]

Q. When you were there, you were only there for a short period during the day? A. That was all.

Q. She was finally repaired by the Seattle Dock and Construction company, was she not?

Mr. CLISE.—I object as incompetent, irrelevant and immaterial. This is covered by the stipulation.

Mr. CAMPBELL.—I will reserve the right to call

(Testimony of George F. Thorndyke.)

Mr. Thorndyke on that point. I do not consider that it is excluded by the stipulation. I will wait until you have finished with Mr. Walker before I decide. I have no question in my mind as to our right to inquire into the repairs on the vessel, under the stipulation.

Q. Who did you talk with in Portland that told you that Mackintosh was irresponsible?

A. I do not remember whether I got the information at that time or got it at other times.

Q. I ask you who you talked with from which you gained this general reputation?

A. I do not remember.

Q. Cannot you give the name of any one?

A. I cannot give the names. I talked with Walker about him.

Q. Your surveyor? A. Yes, sir.

Q. Who else?

A. I think I talked with Johnson of the drydock company.

Q. The Port of Portland Drydock company?

A. Yes, sir.

Q. Was he an employee of the Port of Portland?

A. As I remember it. [156]

Q. What did Johnson say to you?

A. I cannot give the conversation. I got the information in Portland that Mackintosh was irresponsible.

Q. That was the impression that you got?

A. That is the impression that I got.

Q. You cannot give me any specific statement

(Testimony of George F. Thorndyke.)

given to you by any particular man?

A. Nobody addressed a letter to me. I cannot remember any particular one, but that was the opinion.

Q. What was the case on which he fell down?

A. The "Elder," I understand, very badly.

Q. That was the time she was wrecked at Gobel?

A. Repairing after that, yes.

Q. Who told you that?

A. I do not remember now.

Q. What did they say about that?

A. I think he was the dock-master and had to be dismissed in the middle of the work.

Q. You say you think; however you do not know it yourself? A. I was not there, no.

Q. All you know is what some one told you?

A. That is all I got from inquiries.

Q. Who told you and what did they say?

A. I do not remember, as I told you before.

Q. Will you look up these matters I have asked you about and let us know in the morning?

A. Yes, sir. [157]

Redirect Examination.

Q. (Mr. CLISE.) Mr. Thorndyke, what, in your opinion, was the value of the hull of the "Nottingham," that is the value as she stood, exclusive of cargo as you saw her in the harbor of Astoria on October 16, 1911?

Mr. CAMPBELL.—I object as incompetent, irrelevant and immaterial; and for the reason it forms no basis on which abandonment can be made as for constructive total loss under the terms and conditions

(Testimony of George F. Thorndyke.)

of the policy covering this vessel.

A. She was worth but little or nothing. No more than anywhere from three to four thousand dollars. That would be a speculation.

Mr. CAMPBELL.—You force me to go into that stipulation. I will offer this stipulation.

Mr. CLISE.—I do not intend to ask any question that is a violation of this stipulation. I am not touching the “Nottingham” after the first day of June. You can ask anything you wish prior to the time we made the stipulation and I will not make any objection.

Q. What, in your opinion, Mr. Thorndyke, would have been the value of the “Nottingham,” if she had been repaired in accordance with the plans and specifications prepared by Mr. Walker, and upon which you asked for bids?

Mr. CAMPBELL.—This action is laid upon two policies covering actual and constructive total loss, and the information sought by the question is incompetent, irrelevant and immaterial, for the reason that it forms no basis on which an abandonment as for constructive total loss, under the terms and conditions of the policy, could be made. [158]

A. Not in excess of twenty-five thousand dollars.
(Witness excused from the stand.) [159]

[Testimony of Frank Walker, for Plaintiff.]

FRANK WALKER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Q. (Mr. BOGLE.) State your name, age, residence and occupation.

(Testimony of Frank Walker.)

A. Frank Walker. Age, forty-seven years; residence, Seattle, Washington. Occupation, marine surveyor, consulting engineer and naval architect.

Q. How long have you resided in Seattle?

A. I have resided on Puget Sound about eighteen years. Eight years in Seattle and ten years in Tacoma.

Q. How long have you been engaged in business as a marine surveyor? A. About sixteen years.

Q. And during that same time have you been a naval architect and marine engineer?

A. All of the time.

Q. Have you been actively employed during that entire time in these vocations? A. All of the time.

Q. Were you at any time during the fall of 1911 called upon to inspect the schooner "William Nottingham" after the disaster which occurred to her?

A. Yes, sir.

Q. At what time?

A. I cannot exactly give the date offhand, but somewhere in October.

Q. By whom were you requested to act in the matter?

A. By Mr. Thorndyke, manager of the company.

Q. What did you do?

A. I proceeded to Astoria and examined the vessel as she lay [160] at anchor.

Q. State what her condition was as you found her at that time?

A. I found the vessel in a very wrecked condition. Dismasted with the exception of the fore lower mast.

(Testimony of Frank Walker.)

All of her rigging, sails and gear gone with the exception of the foresail and one or two headsails, I cannot say which. And her chain plates were broken off and deck-load disarranged and part of it gone. The vessel had considerable water in her. Her cabins were gutted. The fore-castle was gutted and the galley and the engine-house gutted. The remaining fore-rigging that was standing was damaged. She was a general wreck.

Q. What was the condition of her furniture and ship's stores? A. It was destroyed.

Q. Was she filled with water?

A. She had been pumped out by that time. There was some water in her, I cannot say how much. I did not sound her at the time.

Q. How was she loaded, with lumber?

A. Loaded with lumber and part of it was missing.

Q. Part of the deck-load?

A. Part of the deck-load, yes.

Q. Could you tell from your inspection whether she had been submerged prior to the time you saw her?

A. It gave every appearance of the main deck having been considerably under water, and a lot of water in the cabin and storeroom, all of which were above the main deck.

Q. Were there any facilities at Astoria for repairing the vessel?

A. Not to my knowledge. [161]

Q. Were there any facilities there for discharging cargo in order to make an inspection of the vessel and

(Testimony of Frank Walker.)

ascertain her condition and damage or make repairs?

A. I am not well acquainted with Astoria. I could not say.

Q. You went down to Astoria with Mr. Thorndyke, did you? A. With Mr. Thorndyke, yes.

Q. And that was on or about the 16th of October, 1911, was it not?

A. I believe it was the 18th. My report will show, the survey report that I made was dated the day I went aboard.

Q. Do you know whether or not Mr. Thorndyke, as the representative of the owner at that time, sent an abandonment of the vessel to the underwriters?

A. I do not know, only I think I remember he had sent them such a message.

Q. Mr. Walker, considering the condition of the vessel at the time you saw her, the location and distance from any port where she could be repaired; the risk or peril, if any in getting her to a port where she could be repaired, I will get you to state whether or not in your opinion there was any degree of probability that that vessel could be taken to a port where she could be repaired, and could be repaired and restored to the condition she was in before the accident, at an expense not exceeding fifty per cent of the cost of making the repairs?

Mr. CAMPBELL.—I object as incompetent, irrelevant and immaterial, for the reason that none of the facts inquired of would constitute a basis for an abandonment as for a constructive total loss under the terms and conditions of the policies covering on

(Testimony of Frank Walker.)

the vessel against actual and [162] constructive loss.

A. I do not catch the question.

Q. The question is, whether in your opinion, based upon your experience in shipping matters and repair of ships, there was any probability or reasonable probability that this vessel lying where she was at Astoria at the time you saw her, in the condition she was in, could be removed from there to a port where repairs could be made, and the necessary repairs made to the vessel and restore her to the condition she was in before the accident, at an expense of less than fifty per cent of her value?

A. You mean her lying as she did there?

Q. At an expense of less than fifty per cent of her insured value. She having been valued prior to the accident at forty-five thousand dollars.

A. Do I think she could be safely transported to a place to make the repairs for the matter of twenty thousand dollars?

Q. Was there any reasonable doubt of the probability that she could have been removed in safety and these repairs made at an expense of less than \$22,500?

A. You could not have removed the ship and made the repairs for fifty per cent of her insured value.

Mr. CAMPBELL.—My objection goes to the substance of all these questions.

Mr. BOGLE.—Yes, sir.

Q. Did you have any further connection with the vessel while she lay at Astoria? A. No, sir.

(Testimony of Frank Walker.)

Q. When did you next see or have any connection with the [163] vessel?

A. The next time I visited the ship at St. Johns drydock, Portland.

Q. At whose request?

A. At the request of Mr. Thorndyke.

Q. In what capacity and for what purpose?

A. For the purpose of making a survey on the vessel.

Q. Did you make a survey? A. I did.

Q. Did anyone join you in making the survey?

A. Captain Crow of the San Francisco Board of Underwriters.

Q. Who was he representing on the survey?

A. He was representing the underwriters interested.

Q. At what time was this survey made?

A. The report will show. I cannot remember the date.

Q. Where was the vessel lying at the time you made the survey?

A. She was on the drydock at St. Johns.

Q. Had she been discharged of her cargo?

A. The cargo was on the wharf, part of it.

Q. Where was the balance of it, had it all been discharged from the ship?

A. Yes, it had all been discharged from the ship at that time.

Q. Had the water been pumped out?

A. Oh, yes, she was quite dry.

Q. Had she been cleaned up?

(Testimony of Frank Walker.)

A. No, there had been nothing done in the way of cleaning up.

Q. Did you make a report of your survey? [164]

A. I did.

Q. Look at the document I hand you and state whether that is the report which you made of your survey at that time.

A. Yes, sir, that is my report.

Mr. BOGLE.—I offer this in evidence, the report and specifications as prepared by the witness.

Mr. CAMPBELL.—I desire to reserve the right to object, until I have had an opportunity to inspect the specifications.

Paper marked Plaintiff's Exhibit "I," filed and returned herewith.

Q. Did you on a subsequent occasion make an inspection and report of survey on that vessel?

A. Yes, sir.

Q. At what time?

A. I cannot say. I made a written report and it shows.

Q. Look at the paper I hand you and state if that is the one you made, and state when you made it.

A. Yes, sir, that was made by me in March.

Mr. BOGLE.—I offer this in evidence.

Mr. CAMPBELL.—I desire to reserve my right to object to this also.

Paper marked Plaintiff's Exhibit "J," filed and returned herewith.

Q. Please explain why you made this second supplemental report of survey?

(Testimony of Frank Walker.)

A. In making the first survey on the vessel, I made it with Captain Crow representing the San Francisco Board of Underwriters. All in the first specifications were agreed to by Captain Crow and myself, but he would not agree to some of the other items that I claimed at the [165] time, and therefore I individually made that report to the owners.

Q. Does this supplemental report of survey set forth damages that had been received by the vessel at the time of the accident in October, 1911, and repairs that were necessary on account of these damages?

A. Yes, sir. Partly the work recommended in that supplemental survey was to find the leak in the vessel.

Q. Then aside from the work that is recommended in this supplementary report of survey going to the location of the leak, the other items mentioned are damages received by the vessel in this disaster of October? A. Yes, sir.

Q. Was the leak the result of the disaster that had happened to the vessel?

A. That I cannot say. It was claimed to be a leak that we could not find. There was a leakage supposed to exist that we could not find when she was on the drydock.

Q. Was there any way to locate that except by doing the work that is recommended in this supplemental report of yours?

A. Not to my knowledge.

Q. You know nothing about whether there was a

(Testimony of Frank Walker.)

leak in the vessel prior to the commencement of this voyage in October, do you?

A. No, I could not say.

Q. Mr. Walker, considering the condition of the vessel as she lay at Astoria at the time you saw her on or about the 18th of October, 1911, in your opinion was there any risk of loss or further damage to the vessel incurred in undertaking to take the vessel from there to St. [166] Johns for repairs?

Mr. CAMPBELL.—I object as incompetent, irrelevant and immaterial, for the reason it forms no basis on which to predicate an abandonment for constructive total loss under the terms and conditions of the policies.

A. The usual risk taking a vessel up the river.

Q. Was there any more risk taking a vessel in her condition than taking a vessel in good repair?

Mr. CAMPBELL.—I renew my last objection.

A. Yes, I think there was.

Q. Was that risk slight or considerable?

Mr. CAMPBELL.—I renew my objection to this same line of questions.

A. The vessel would be harder to handle, especially providing she had any water in her.

(Previous question read to witness.)

Mr. CAMPBELL.—It is stipulated that my objections run to this line of examination without my repeating my objections to each question?

Mr. BOGLE.—Yes, sir.

A. I think there was great risk of the vessel being stranded on some of the bars along the river.

(Testimony of Frank Walker.)

Q. Mr. Walker, were you present when the bids for repairs on the vessel were received?

A. No, sir.

Q. Did Mr. Thorndyke representing the owner of the vessel have any consultation with you in regard to the responsibility or reliability of the bidders?

A. Yes, sir.

Q. About when was that? [167]

A. I really could not say when it was. It was after he had received the bids and was considering them.

Q. Did he at that time inform you of the statement of Cornfoot that the bulk of the work under his bid, if awarded to him, would be done by Mackintosh?

Mr. CAMPBELL.—I object as hearsay.

A. He did inform me so.

Q. Do you know the Mackintosh referred to, by reputation? A. Yes, sir.

Q. What did you advise Mr. Thorndyke with respect to the bid of Cornfoot, or his company, in view of the statement that Mr. Thorndyke had made to you, that Cornfoot had said that Mackintosh would be in charge of the work?

A. I advised Thorndyke not to consider the bid.

Q. Why?

A. In the first place, the people *that* were not in that business themselves, they were in an outside business in a small way, not fitted and not equipped, and this Mr. Mackintosh had no equipment himself. And I further objected to Mackintosh owing to pre-

(Testimony of Frank Walker.)

vious experience with the man.

Q. What was the nature of the previous experience that you had had?

A. Mackintosh was irresponsible.

Q. Do you know what his record had been in the past with respect to completing contracts within the time specified and according to the terms of the contract?

A. I know that his reputation is not good around Portland, and I had personal experience.

Mr. CAMPBELL.—I move to strike that portion of the answer [168] as not responsive to the question.

A. Of his irresponsibility.

Q. You mean by irresponsibility, financial irresponsibility or unreliability in doing work within the time or according to the terms of his contract?

Mr. CAMPBELL.—I object as leading.

A. I do not know anything about his financial standing. I am talking about his general character, the way in which he conducts his work.

Q. If you had been the owner of this vessel and she had been uninsured, would you have accepted that bid under the circumstances?

A. No, sir, not under any consideration.

Q. Mr. Walker, did you at any time invite bids, or did Mr. Thorndyke to your knowledge, invite bids upon the work called for in your supplemental report of survey?

A. I think Mr. Thorndyke did, I did not.

Q. Did you see the bids?

(Testimony of Frank Walker.)

A. I have seen it since.

Q. Look at the paper I now hand you, and state if that was the bid he received for that work.

A. Yes, sir.

Mr. BOGLE.—I offer in evidence the paper identified by the witness.

Mr. CAMPBELL.—I object as a self-serving document. It is incompetent, irrelevant and immaterial for the reason we have not the right to cross-examine the bidder.

Paper marked Plaintiff's Exhibit "K," filed and returned herewith.

Q. Mr. Walker, are the prices named in this bid, exhibit [169] "K," for the various items of work called for there, reasonable?

A. All but one item. I objected to it when it was submitted to me.

Q. What item was that?

A. The item number 6, for removing wood and cauking back of the bulwark stanchions. The bidder did not quite understand what was wanted of him. He did not understand what was called for there. And he bid for very much more work on that one item than we intended.

Q. What is the bid on that one item?

A. \$755.

Q. What would have been the reasonable value for that work?

A. For what we would require there would be about half that price, say about four hundred dollars.

(Testimony of Frank Walker.)

Q. Were the prices on the other items reasonable, in your judgment?

A. The other prices appear reasonable.

Q. Mr. Walker, were the repairs called for in that supplementary report and survey, covered by this bid of Hall Brothers Marine Railway & Ship Building Company, repairs made necessary by the accident to the vessel in October, 1911? A. Yes, sir.

Q. Could the vessel have been put in good seaworthy condition as she was in prior to the accident, without making these repairs?

A. Not in my estimation.

Q. Mr. Walker, considering the condition of the vessel as she lay at Astoria, at the time you saw her in [170] October, 1911, the distance from any port where she could be repaired, the risks of getting her to such port and the expense of repairs, what would you consider was the reasonable value of the vessel at that time?

Mr. CAMPBELL.—I object for the reason that it is not an inquiry as to facts which would constitute a basis of abandonment as for constructive or total loss under the terms and conditions of the policies.

A. That is the value of the vessel at that time?

Q. At that time.

A. At that time I considered her value practically nothing.

Q. Mr. Walker, if the vessel, after she was taken to St. Johns, had been repaired according to the specifications of your first report of survey, what would

(Testimony of Frank Walker.)

have been her value after these repairs were completed?

A. In the neighborhood of tewnty-four or twenty-five thousand dollars at that time.

Mr. CAMPBELL.—My objection runs to this line of examination, that it does not constitute any basis for abandonment.

Cross-examination.

Q. (Mr. CAMPBELL.) Were any bids invited from others than Hall Brothers on this supplementary report? A. I do not know.

Q. When did you visit the vessel, Mr. Walker?

A. I previously stated somewhere about October 18th, I think it was.

Q. Where was she then? [171]

A. In Astoria.

Q. How long did you remain there?

A. About an hour.

Q. Aboard the vessel? A. Yes, sir.

Q. What water was she drawing at that time?

A. I could not say.

Q. Deep draft?

A. She was deep in the water, yes.

Q. Deck-load gone down to the rails?

A. Somewhere about that.

Q. Still her deck was covered with lumber?

A. Her deck covered with loose lumber.

Q. Her mainmast, mizzen and spanker-masts were gone? A. Yes, sir.

Q. And her cabins gutted?

A. The cabins were gutted.

(Testimony of Frank Walker.)

Q. And her rigging and foremast damaged?

A. Yes.

Q. And more or less damage around her fore-castle-head?

A. Yes, and her poop was badly damaged on the port side.

Q. You were not able to go down into the body of the vessel?

A. No, not into the hold of the vessel at all.

Q. Were not able to see below her water-line at that time?

A. Not able to see anything on the main deck itself, except in the cabins and under the fore-castle-head.

Q. When did you next visit the vessel?

A. I think it was in December.

Q. Between what dates? [172]

A. My survey report will give you the date; I cannot remember the dates.

Q. Refer to it and refresh your memory.

A. On December 21st, it says here.

Q. She was then at the dock at St. Johns?

A. At the Port of Portland Drydocks at St. Johns.

Q. When did you next visit the vessel?

A. I really cannot say. I believe it was in May, sometime.

Q. How much was your bill for services to the owners, your entire bill?

A. I forget; my bill is in.

Q. \$750? A. I think it was, yes.

(Testimony of Frank Walker.)

Q. Is this a correct statement: For services in connection with this case including the trip to Astoria, October 17 and 18, 1911; trip to Portland, December 20 and 21; trip to Portland, May 3 and 4, 1912, and services, besides reports on same dated October 18, December 21, and January 21, 1912; also supplemental reports dated March 4th and March 27th, 1912; consultations at various dates with owners in connection with adjusters, underwriters and surveyors and attorneys, together with expense vouchers attached?

A. I think that is it in detail.

Q. So that you did not see the vessel from the 21st of December, 1911, until the 3d and 4th days of May, 1912.

A. Yes, I saw her between that time.

Q. When? A. Several times, but not officially.

Q. Where is the Port of Portland dock located?

A. St. Johns. [173]

Q. How far is that located from Portland?

A. About seven or eight miles.

Q. How did you get down there?

A. Two ways. By street-car and by launch.

Q. Takes the greater part of half a day to get down?

A. No, about an hour. Say an hour to get to the ship.

Q. You visited her only between these dates?

A. I said on December 21 and 22.

Q. But you did not visit her again until May 3d or 4th?

(Testimony of Frank Walker.)

A. You asked me if I saw her. I saw her several times.

Q. Did you visit her between December 21 and May 4th? A. No, I did not go aboard.

Q. You saw her in passing up and down the river?

A. I was only passing alongside of her.

Q. But you never went aboard of her during that time? A. I had no occasion to.

Q. You did not go aboard of her?

A. I said I did not go aboard of her.

Q. How much did that vessel draw loaded with a full cargo of lumber? A. I do not know.

Q. What would your judgment be?

A. I really do not know what she draws.

Q. Did you ever know of her loading with lumber at Portland and proceeding to sea down the Columbia?

A. No, I do not recollect her loading at Portland.

Q. Did you ever see her type of vessel load at Portland and go to sea from Portland? A. Yes.

Q. Would she draw more water or less water when she had a [174] full cargo on as compared with when she had lost all of her deck-load down to the rails?

A. Depends on whether she had water in her.

Q. Assuming that she had nothing but lumber in her?

A. With nothing but lumber in her she would draw less water.

Q. When? A. With half of the deck-load gone.

(Testimony of Frank Walker.)

Q. Assuming that at the time she was towed from Astoria to Portland that all the water had been pumped out of her, that she would draw less water or more water than when fully loaded?

A. She would draw less water.

Q. Astoria is located at the mouth of the Columbia River, is it not? A. Yes, sir.

Q. It is a broad navigable stream, is it not?

A. In places.

Q. Navigable stream to Portland for ocean going steamships and vessels, is it not? A. Oh, yes.

Q. And a highway for a very large volume of commerce?

A. I do not know what commerce there is on the river; there is quite a little.

Q. Portland is the principal port on the river?

A. Yes, sir.

Q. And towage of vessels up and down the river is a matter of very frequent occurrence?

A. Very frequent occurrence.

Q. Astoria is a very small place, is it not?

A. Yes, it is a very small place. [175]

Q. Vessels are not exposed to the weather at all in towing from Astoria to Portland?

A. Not to any very great extent.

Q. You would not get in any sea of any size on the Columbia? A. No, none to speak of.

Q. Do you know when she was towed from Astoria to Portland whether the water had been pumped out of her?

A. I do not know anything about it.

(Testimony of Frank Walker.)

Q. You did not see her between the time you visited her in October and the time you saw her on the dock? A. No.

Q. I notice that the opening part of your survey report, Mr. Walker, speaks of abstracts taken from the statements made by the master. What do you mean by abstracts from the statements of the master?

A. Generally in making a survey we mention the matters stated in the master's statement of what the trouble has been, the dates, and how it occurred and that sort of thing. We usually take out the main items and incorporate them in the report, to give those interested an idea of what it is about.

Q. Were these statements of these matters in writing from which you took this abstract?

A. Yes.

Q. Where did you see them?

A. The master's own statement to me.

Q. Have you a copy of the written statement?

A. No.

Q. What became of it?

A. I do not know. [176]

Q. Did you deliver it to Thorndyke?

A. No. It was a statement—a copy I think of the statement was also given to the adjusters.

Q. Johnson & Higgins? A. Yes, sir.

Q. Is it a fact that the master stated to you this: "That the vessel loaded a full cargo of lumber at Westport, Oregon, and on September 26th vessel then being loaded and ready to proceed at about

(Testimony of Frank Walker.)

4:40 P. M. of same day the tug was made fast to the ship and started for the mouth of the slough, all going well until closely approaching the entrance of said slough when vessel took the ground and remained fast until the next high tide on the following morning when she was pulled off by the tugs 'Walla' and 'Oklahoma' and taken to an anchorage at Astoria"? A. Yes.

Q. Did he also state to you "That on October 2d vessel sailed from Astoria to Callao, Peru"?

A. Yes, that is his statement.

Q. Did he also state to you "That nothing worthy of note occurred until October 4th at about 2 P. M., when it was discovered that the vessel was making water rapidly"?

A. Whatever is there is what the master stated to me.

Q. He made that statement to you that I have just read?

A. Yes. There might be some errors in dates or hours.

Q. But in substance that is what he stated?

A. Yes, sir.

Q. Did he also state to you that "the hand-pumps were started and it was found that by pumping about one hour in four the water could be kept down"? [177]

A. Yes, sir.

Q. Did he also state that "On October 6th the vessel was put on the starboard tack and as soon as this was done it was found that she made water

(Testimony of Frank Walker.)

more rapidly and in a short time it was impossible for the hand-pumps to keep her free"? Did he state that? A. That was taken from his statement.

Q. Did he state, "An attempt was made to start the steam-pump which, however, failed to work"?

A. That is his statement.

Q. I want you, Mr. Walker, to take this photograph and to designate by drawing upon it a line from the point to the margin and put at the end of each line a number to identify it. I will ask that the photograph be identified by the commissioner. (Photograph marked "2" for identification.) I wish you to point on photograph 2 the stems of the masts that may be there. Just draw a line to the margin and number it.

A. Here is one that I mark 1.

Q. That is the main mast? A. Yes, sir.

Q. Are either of the other masts that are mentioned shown on this photograph?

A. Here is the mizzen. (Marked 2.)

Q. Now, will you tell me what are called mast wedges and coats?

A. When the mast is set in between the partners there is a space of about—in this case about four inches all around, two and a half to three inches all around. That is left for wedges, what we call wedges, wedges forced down from the [178] top around the mast. Then there is a canvas coat put over these. They are caulked and a canvas coat put over for extra protection, to make it water-tight.

Q. That is down around the hole which is made in

(Testimony of Frank Walker.)

the deck for the mast to pass through, and the hole is larger than the mast itself?

A. Yes, sir. To hold the mast tight to the deck, wooden wedges are put in around the mast, between the mast and the deck.

Q. How high do the wedges extend above the deck? A. Five or six inches.

Q. Then these are called the mast wedges?

A. Yes, sir.

Q. And above the wedges there is fastened a piece of canvas around the mast?

A. The mast coat goes over that.

Q. This piece of canvas?

A. Yes, it is shrunk up into the form of a circle around the mast, and then around the wedges, with a lead ring around the foot, a small coaming around.

Q. So that it forms a sort of tent around the base of the mast? A. Yes, it covers up the wedge tops.

Q. As a protection for the tops? A. Yes.

Q. How high does this protection extend above the deck?

A. Perhaps 15 or 16 inches; depends on the height of the wedges.

Q. What are called the chain-plates?

A. The chain-plates are the plates that are bolted through the ship's sides, to which the shrouds are attached. [179] by means of turnbuckles or dead-eyes and lashings.

Q. Can you show me on the photograph, which I have had identified as 3, any chain-plates?

(Testimony of Frank Walker.)

A. These are the chain-plates here, spanker chain-plates.

Q. Mark that with the letter "C."

(Witness does so.)

Q. What are they bolted to, the planks of the vessel? A. Bolted over the plank of the vessel.

Q. How far do they extend down on the side of the planking? A. Oh, seven or eight feet.

Q. And there are sets of chain-plates for each mast, on each side of the vessel? A. Yes, sir.

Q. Or eight sets of chain-plates altogether?

A. In this case eight, yes.

Q. Now, in your specifications marked exhibit "I," you state, "It being the intention of the following specifications to briefly describe the spars, running and standing rigging, iron work, sails, etc." What do you mean by the rigging of the vessel?

A. Exactly what the word implies, the rigging.

Q. That is standing and running rigging?

A. I think it says that. That is what it means.

Q. Describe it in ordinary language so that a layman can understand. Do you mean the wires?

A. There are the back stays and the fore and aft stays.

Q. Are these all?

A. No. Jumbo stays, spring stays—

Q. Are these the wires that run from the side of the vessel to the mast to hold it in place? [180]

A. They are to stay the mast in position, some of them, and others to carry the sails on.

Q. But they are the ropes and wires?

(Testimony of Frank Walker.)

A. Jib-stays, jib topsail stays, ropes.

Q. Ropes and wires from the mast to—

A. And also to take the strain; also when the vessel has sail on her.

Q. Will you point out on identification 2 the fore-castle-head rail, and draw a line from it to the margin? A. (Witness indicates with figure 3.)

Q. Will you also identify the iron chock on the fore-castle-head to which you refer?

A. The chock that was broken?

Q. Yes.

A. (Marked 4.) That is what is left of it.

Q. Can you show me on identification 3 the moulding in the way of the chain-plates?

A. (Marks it M.)

Q. Show me on identification 2 the jubsheet cleat.

A. There is a mast in the way.

Q. Where is that located?

A. I will show the one on the opposite side. (Marks it 5.)

Q. Where were the glass deck lights in the fore-castle-deck?

A. There are too many fittings in the way. Here is one of them.

Q. Just show us one. A. (Marks it 6.)

Q. Where is that located, in the deck itself?

A. Yes, laid into the deck.

Q. Can you show me the galley scuttle? [181]

A. Yes, sir. (Marks it 7.)

Q. What do you mean by the quick work on the fore-castle-head?

(Testimony of Frank Walker.)

A. That is the quick work. (Marks it 8.)

Q. Show me the quick work on the poop, referring to exhibit 3.

A. That is not the quick work referred to. It is the wrong side of the ship.

Q. I understand.

A. That is the quick work. (Marks it Q.)

Q. The quick work you refer to in specifications on the port side of the poop, can you show that on the photograph that has been marked 4 for identification? A. This is the quick work, Q.

Q. What does the quick work on the poop form, the outside of the cabin?

A. That is built up from the waterway up.

Q. The waterway is where located?

A. On identification 2 it is marked 9.

Q. What are the waterways?

A. The waterways are heavy timbers running fore and aft on the vessel on each side.

Q. Whereabouts?

A. On each side of the vessel, and on each side of the stanchions. The stanchion butts through them.

Q. Where is it with respect to the deck of the vessel?

A. It is the raised portion of the deck. They are laid down right on to the beams of the vessel; generally extend up about eight or ten inches higher than the deck.

Q. And the deck is laid on the beams alongside?

A. The quick work and covering boards are laid in there and [182] then the deck is laid up to the

(Testimony of Frank Walker.)

waterways. The waterways run fore and aft of the ship.

Q. What do you call the covering board of the forecastle-head?

A. Board that runs across over the forecastle-head and covers the end of the deck planking. I have marked it 10.

Q. Where are the bulkheads and doors to the gallery to which you refer in your specifications?

A. They are inside.

Q. Under the forecastle-head? A. Yes, sir.

Q. What are the bulkheads made fast to?

A. They are built bulkheads right from the deck. There is a sill laid down, then studs put in and run along the beams and bulkheads are built up to it.

Q. Then the bulkhead runs from the main deck of the vessel up to the forecastle-head deck?

A. Wherever there is one built. In this case they run from the main deck to the forecastle-head deck.

Q. What do you mean by wedges and coats to the bowsprit?

A. The bowsprit is wedged in the same manner as the mast, or similar manner to the mast.

Q. Through what deck?

A. Where it passes from the bow of the vessel it is wedged tight and then there is a canvas coat around it to keep the water from running in or entering when diving into the seas.

Q. Is it made fast to the deck?

A. It is made fast to the superstructure planking.

Q. Whereabouts are the coamings to the scuttle

(Testimony of Frank Walker.)

and hatches; what are they fastened to? [183]

A. What deck?

Q. The fore-castle-head deck.

A. There is the regular ladder in this and then the coaming set on the ladder.

Q. Mark it.

A. There is another one forward of the mast.
(Marked 11.)

Q. Where are the wood foundations of the windlass laid? A. Under the fore-castle-head.

Q. What are they laid on, the main deck?

A. On the main deck.

Q. Will you identify the hatches of the vessel?

A. I can only see two of them.

Q. Mark these two, please.

A. The fore-hatch is 12 and the main hatch is 13.

Q. Are the hatch covers laid over the hatches?

A. No. Partly. Some are lying on there.

Q. The planks that are piled on the main hatch?

A. These are the hatch covers.

Q. They go on top of the hatch? A. Yes, sir.

Q. Can you mark the port rail and pin rail and chafing piece? A. Yes, sir.

Q. Mark them as well as you can.

A. (Marks 14.)

Q. Are they shown in photograph that has been marked 5?

A. If they belong to the same ship they are.

Q. It is a photograph of the same ship?

A. The pin-rail I have marked P. Main-rail covering board marked M.

(Testimony of Frank Walker.)

Q. Chafing piece? [184]

A. This is the top piece.

Q. On the top of the main rail?

A. Yes, marked C. H.

Q. In your specifications you provide for six deck planks in the way of the mainmast to be renewed to approved butts? A. Yes.

Q. Show where that planking is.

A. I cannot. I can only show approximately *show* the location.

Q. The mainmast, then. A. (Marked 15.)

Q. Were these planks to extend after from the mainmast toward the main hatch?

A. It says in the specifications. I forget which way it runs.

Q. It says six deck planks in the *of the* mainmast to be renewed to approved butts. You were going to take out the old planks and put in new deck plank?

A. Going to take out the damaged deck planks and put in some good ones.

Q. You speak of three planks in the way of the mizzenmast to be renewed. Were these three deck planks around the mizzenmast?

A. They butted up to the mizzenmast, yes.

Q. They were either between the main hatch and the mizzenmast or aft of the mizzenmast?

A. I think they ran both ways.

Q. Mark them as near as you can.

A. (Marked 16.)

Q. Through what deck did the spanker-mast run?

(Testimony of Frank Walker.)

A. Went through the main deck. [185]

Q. That is forward of the cabin on the poop?

A. Forward of the poop.

Q. You speak of three planks at the spanker-mast to be renewed from the hatch coaming to beam inside of the poop?

A. They go from the mast to the break of the poop.

Q. They were corresponding deck planks to the others damaged by the breaking of the mast?

A. Yes, sir.

Q. Where were the deck beams that were to be renewed and repaired?

A. Here they are. (Marked 17.)

Q. What do you mean by the wood seatings at the fore, main and mizzen-sheet ringbolts?

A. They were sheetings with half turns over when the ship goes on a different tack, so that they did not go into the deck.

Q. That is they are heavy pieces of wood fastened on to the main deck? A. Fastened on to the deck.

Q. And to them are rings—

A. The ringbolts pass through them and from the deck into the deck beam.

Q. And used for the sheets of the vessel when easing off or hauling in the booms or the sails on the masts? A. Yes.

Q. Where are the nine deck lashing bolts fastened? A. They are along these waterways.

Q. Mark there on identification 2 or identification 5, the location of the ringbolts?

(Testimony of Frank Walker.)

A. (Marked with R. on identification 5.) [186]

Q. Can you show me on identification 5 what you mean by the aft of the bulwark stanchions?

A. That is around here. (Marked F.)

Q. Is that the lower part of the stanchion at the foot of the covering board? A. Yes, sir.

Q. And the covering board is alongside the waterway? A. Yes, sir.

Q. Where are the alleyways along the forecandle-head? A. There, these doors here.

Q. The two doors on each side of the forecandle-head? A. Yes, sir.

Q. Mark one of these, please. A. (Marked 18.)

Q. Through that door there you step on to the main deck of the vessel? A. Yes, sir.

Q. Can you show me on identification 3 what you mean by the overhang of the poop which was to be renewed?

A. No. This rail stands on it. You cannot see it from here. The jury rig sticks over it.

Q. What do you mean by the overhang of the poop?

A. Well, the poop is built to overhang the main deck; there is a walkway across the ship.

Q. What portion was to be renewed then?

A. I forget. You will have to look at the specifications. It is in writing.

Q. The specifications provides for the overhang of the poop to be renewed together with rail and stanchions on the port side and in the center. [187]

A. Yes.

(Testimony of Frank Walker.)

Q. What part of the vessel was to be renewed, the deck of the vessel or the cabin or the overhang of the poop? Describe it so that we will understand.

A. I do not know how to describe it otherwise than it is an extension of the poop. The vessel has a rail around on the forward side of this space where people can walk across or go from one side to the other of the vessel. It is on a level with the poop-deck, that is with the break of the poop.

Q. Where you could walk on it and stand on a level with the main deck or level with the poop?

A. No, this is the poop-deck, and it is between this and the main deck.

Q. The poop-deck is shown in the immediate foreground in the photograph marked identification 2?

A. Yes, sir. That is the poop-deck and main deck.

Q. Mark the poop-deck with a number.

A. (Marked 19.)

Q. You speak of three strakes of quick work on the port side of the poop to be renewed. You have already marked that on identification 4?

A. Yes, sir.

Q. Marked it Q?

A. Yes. There is only two of them marked.

Q. What do you mean by covering board?

A. There is no covering board, but you can see where it used to be.

Q. Mark it with the letter C where the covering boards go on identification 4. (Witness does so.) Where is the [188] Buffalo rail?

(Testimony of Frank Walker.)

A. Here is the buffalo rail.

Q. Mark it. A. (Marked with B.)

Q. What do you mean by buffalo rail?

A. Well, it is chock or rail that runs around on top of the covering board along the poop and fore-castle-head.

Q. Would it be a rail that was laid on top of the board you marked C on identification 4?

A. Not there, there is no buffalo rail there. It is on this side.

Q. It is laid on the board marked by the lower C?

A. Yes.

Q. On identification 4? A. Yes.

Q. So there are two planks to be renewed in the poop-deck on the port side. Will you show me where these planks were on identification 4?

A. Yes, alongside there.

Q. Mark that with D. A. (Does so.)

Q. What do you mean by companionways, skylights, binnacles and wheel-booxes to be overhauled and renewed on the poop?

A. They were splintered by the seas.

Q. What is the companionway?

A. You haven't anything to show here.

Q. What is it?

A. The companionway is the entrance way down into the cabin from the poop-deck, at the break of the poop; there is two.

Q. The break of the poop is the forward end of the poop? [189]

A. There is a forward and aft companionway.

(Testimony of Frank Walker.)

Q. The break of the poop is at the forward end of the poop? A. Yes, sir.

Q. Where were the skylights?

A. Over the cabin.

Q. And they were on top of the poop-deck?

A. Yes, sir.

Q. How high above the poop-deck did they extend?

A. About a foot.

Q. Where was the binnacle?

A. Forward side, just forward of the wheel.

Q. Did that stand on a standpipe by itself?

A. A stand by itself.

Q. Now, will you point out on identification 2 the four seams on each side of the waterways which you recommended to be caulked. A. This is it here.

Q. Draw a line across and mark it.

A. I will mark it on both sides, 21 and 22.

Q. These were seams in the main deck, were they?

A. Yes, sir.

Q. Will you mark the seam on each side of the hatches which you recommended to be caulked.

A. (Marked 23 and 24.)

Q. The specifications say that four seams along the waterways on each side to be caulked full length of the vessel carrying same right under forecastle-head? A. Yes, sir.

Q. That means the full length of the main deck along the [190] superstructure?

A. That meant from the break of the poop right under the superstructure of the forecastle-head right into the eyes of her.

(Testimony of Frank Walker.)

Q. And decks to be caulked around hatches together with one seam on each side of the same for the full length of the vessel?

A. Yes, sir. I have marked these seams.

Q. What do you mean by caulking around the hatches between the—

A. All around the coaming, the hood ends of the plank and alongside.

Q. Mark the hatch coaming for identification on the main hatch. A. (Marked 25.)

Q. And the seams that you recommended was the seam around the hatch coaming and between the deck plank? A. The seams that I agreed upon.

Q. These are the seams in your specifications that you refer to?

A. Yes, I recommended that the whole deck be caulked.

Q. In your specifications you say that alleyways under fore-castle-head be caulked on each side. You mean the main deck in the alleyways? A. Yes, sir.

Q. You say 500 feet of caulking on the poop to be done. That is on the deck marked 19?

A. Yes, sir, number 19.

Q. The alleyways you have already identified as 18? A. Yes, sir. [191]

Q. What do you mean by deck erections?

A. I mean the fore-castle-head and the poop, anything that is erected over the deck.

Q. You say: Decks, deck erections and fittings fore and aft to be given one good coat of oil paint.

(Testimony of Frank Walker.)

A. That means all around interior bulwarks and deck erections.

Q. That was the main deck, poop-deck, forecastle-head deck were to be painted?

A. That means the erections above the decks, the decks were to be painted and deck erections and inside the bulwarks.

Q. You say that mouldings and chafing pieces in way of chain-plates and fore and aft on both sides to be smoothed off, repaired and renewed as may be found necessary to make same good as before, and seams in way of chain-plates to be well caulked?

A. Yes, sir.

Q. Show me on identification 3 what you mean by the seams in the way of chain-plates.

A. These chain-plates pass over the seams of the plank which run fore and aft. I meant underneath that, before the chain-plates are put in *in* place. They should be exceptionally well caulked in that sense.

Q. These seams in the planks on the outside of the vessel underneath the chain-plates?

A. Yes, exactly.

Q. The chain-plates you have marked M on identification 3? A. No, C is the chain-plate. [192]

Q. You also say all chafed and bruised spots in planking around the hull from the water-line to rail fore and aft on both sides, to be dressed off smooth and graving pieces to be fitted where necessary?

A. Yes, sir.

Q. Would that require them to go over the outside

(Testimony of Frank Walker.)

planking of the vessel and smooth it off?

A. Meant to go over the spots chafed where the rigging had gone over the side of the ship and had injured the outside plank of the ship.

Q. What do you mean by graving pieces to be fitted in?

A. Some places in smoothing off they would take out a piece; a graving piece is a small piece let into the plank to bring it up smooth and flush.

Q. What do you call the garboard strake?

A. A strake commencing at the keel. It is the biggest strake plank. Generally a ship has two strakes, upper and lower garboard. They are heavier than the main planking.

Q. It is that planking on the outside of the vessel which lies next to the keel on the bottom of the vessel? A. Yes, right alongside of the keel.

Q. You recommend that that be trimmed off where chafed. What was the chafing?

A. The largest plank was chafed off.

Q. Was that due to some previous stranding or striking some object?

A. I think that was attributable to some previous stranding. I cannot say for certain.

Q. In your judgment it was not caused by any trouble that [193] she got into after she left Astoria?

A. I think my survey report says there what it is attributable to.

Q. Whether it does or does not, it is *not* attributable to this accident?

(Testimony of Frank Walker.)

A. I am not prepared to say when it was done, whether she went over her own wreckage or what.

Q. Or when it was done? A. No.

Q. What do you mean by after length of shoe to keel to be removed?

A. The keel of the vessel has a shoe of about four inches in thickness, a chafing shoe or protection shoe. The keel is coppered on the bottom, and the shoe stuck on over that again.

Q. This is a piece of plank?

A. Full width of the keel, running the full width of the keel.

Q. To take care of any shock that might come to the keel? A. It is a protection.

Q. It is from the aft end of the keel forward?

A. Well, we thought it was the aft length running from the rudder post. I cannot see it on this.

Q. Running from the rudder post forward on the bottom of the keel, the full length of the plank?

A. Yes.

Q. How long would that be?

A. I think it is ten or eleven feet.

Q. What do you mean by cement in the seams?

A. The seams of vessels are caulked up to the load [194] water-line; they are cemented with Portland cement, all wooden ships.

Q. These are the seams between the outside planking?

A. The seams of the outside planking. These spaces in the oakum, forced into the seams, these spaces are cemented to keep the teredo and other in-

(Testimony of Frank Walker.)

sects from getting into the plank, for protection.

Q. When you recommend seams all over ship's bottom where started be removed and replaced by new, that would be put in from the outside of the vessel?

A. From the outside of the vessel.

(Hearing adjourned until July 31, 1913, at 9:30 A. M.) [195]

Seattle, July 31, 1913.

Present: Mr. CLISE and Mr. BOGLE, for the Plaintiff.

Mr. CAMPBELL, for the Defendant.

FRANK WALKER, on the stand for further cross-examination:

Q. (Mr. CAMPBELL.) What do you mean, Mr. Walker, by paying seams?

A. In deck calking we always refer to paying them with putty, and in puttying the seams they are payed. It is the act of putting in the putty.

Q. And paying seams is to put in something, either putty— A. Putty or pitch.

Q. Over the oakum that is in the seams?

A. Yes, we do not refer to it as puttying, but when it is puttied it is payed.

Q. What was the cause of the chafed and bruised spots on the outside planking from the water-line to the rail which you recommend to be smoothed off and graving pieces put into it?

A. Caused by wreckage.

Q. The deckload going overboard and the masts?

A. The deckload of lumber, floating alongside and broken spars and rigging.

(Testimony of Frank Walker.)

Q. Did that wreckage chafe and cut the outside plank of the vessel? A. Yes.

Q. That extended all the way from the rail to the water-line?

A. Various spots. It was not entirely covered with it. [196] There were spots here and there.

Q. But spots scattered all over the entire side of the vessel from the rail to the water-line?

A. Yes.

Q. What is the difference between the ship's bottom and her top sides?

A. We generally refer to the bottom of the ship from the light water-line down.

Q. From the light load line down? A. Yes.

Q. And the top sides from the—

A. From the load water-line up.

Q. That portion is always exposed?

A. Yes, sir.

Q. What do you call the space on the outside planking between the light load line and the deep load line? A. Boot top.

Q. What do you mean by the butts of the planking? A. Where the two planks butt together.

Q. What do you mean by the hood-ends of the plank?

A. Where the ends of the plank fore and aft of the vessel lay in the rebate of the sternpost or the stem.

Q. And the hood-end seams are the seams between the ends of the plank and the stem of the vessel and the ends of the plank and the sternpost? A. Yes.

(Testimony of Frank Walker.)

Q. Was there any other dock between St. Johns drydock and Astoria at which this vessel could have been drydocked? A. Not to my knowledge.

Q. Did you in your specifications for repairs make any [197] recommendation for repair of the steering gear of the vessel?

A. I do not recollect. The specifications will show.

Q. Will you examine them and see?

A. I will have to read them through and see.

Q. You have segregated the specifications into different portions, haven't you, for the repair?

A. Yes. I do not think there was any damage to the steering-gear outside of the wheel-box.

Q. Simply the box itself?

A. The wheel-box as far as I can recollect.

Q. As far as you know the wheel and steering-gear was in condition where it could be used?

A. Oh, yes.

Q. Now, if when this vessel was towed from Astoria to Portland her steering-gear was in condition where it could be used, and she had no water in her, so that her draft was less than it would have been if fully loaded with lumber, wherein was there any greater peril to the towage of that vessel from Astoria to Portland than the ordinary towage on the river?

A. Under these conditions it would be the general risk.

Q. That is incident to every towage?

A. That is incident to every towage. A great

(Testimony of Frank Walker.)

number of vessels go ashore going up and down the river.

Q. It would be the same peril incident to every towage on the river?

A. Providing she had no water in her.

Q. Now they tow the two ways, don't they, on the river: One with the tug ahead and the other with the tug [198] alongside?

A. I have seen them towing both ways.

Q. You did not hesitate to recommend that she be towed from Astoria to Portland for docking?

A. I did not hesitate because that was the only feasible place to take her.

Q. Referring to Exhibit "K," being the Hall Brothers estimate of certain repairs called for by your supplementary report, I will ask you whether or not the first item that provides "caulking of main deck and waterways including space underneath forecastle-deck but not abaft of bulkhead, forward end of cabin on face and sides of bulwark stanchions; pitch all seams and butts. Our price to be one thousand dollars." I will ask you whether or not the caulking therein provided for was not in part a duplication of the caulking that you recommended to be done in your original specifications?

A. A very small portion of it.

Q. It was in part a duplication?

A. In a very small part only.

Q. Now, in what part was it a duplication?

A. The seams along the waterways and around the hatches.

(Testimony of Frank Walker.)

Q. How many seams along the waterways was it a duplication?

A. The survey report says how many seams.

Q. Please answer the question. Cannot you recollect?

A. I think there were four seams on the waterways and one by the hatches. "The foot of bulwark stanchions to be caulked and decks to be caulked around hatches together with one seam on each side of same for full length of [199] vessel. Four seams along waterways on each side to be caulked full length of vessel, carrying same right under fore-castle-head."

Q. Do you know the length of these ten seams that you call for in the original specifications?

A. No, I do not.

Q. Referring to the original specifications again, there in the same place you provide alleyways under fore-castle-head to be caulked on each side.

A. Yes.

Q. Was not that a duplication also?

A. That was a part of it. That is for caulking six or seven seams in each alleyway.

Q. Do you know the lineal length of these seams?

A. No, I do not.

Q. Who wrote the marginal pencil notations on this letter of Hall Brothers, that are partially erased?

A. I do not know. Let me look at it. (Examines paper.) I do not know, it is not my writing.

Mr. CLISE.—They are supposed to be erased so

(Testimony of Frank Walker.)

they cannot be read. If they can be read we desire to have them obliterated altogether.

Mr. CAMPBELL.—You do not object to my inquiring about them, do you?

Mr. CLISE.—Do you think you can read them?

Mr. CAMPBELL.—I think I can. I think it says “specific loss only.” I want to know what it means.

Q. What does that first notation mean when it says “Specific loss only”?

A. I haven't the faintest idea. [200]

Q. What did it mean when they put opposite item 2 the ditto mark “Specific loss only”?

A. I could not tell you. I had nothing to do with the marks. It must be some private memorandum of the person that made them.

Q. What does the notation mean opposite item 3 where it says “declined”?

A. I know nothing about it.

Q. What was meant by the notation opposite item 4 which says “This is correct”?

A. I do not know anything about it.

Q. What did it mean by the notation opposite item 5 marked “declined”?

A. I know nothing about it.

Q. Now, you said that there was a mistake made by Hall Brothers in respect to item number 6 with reference to the \$755 for the removal of the wash strake and caulking backs of all bulwarks, stanchions for full length of the vessel. A. Yes, sir.

Q. Now, that mistake was in that it was not your intention to ask them to give you a bid for removing

(Testimony of Frank Walker.)

the entire wash strake, but simply the wash strake from the break of the poop to the break of the fore-castlehead? A. That was my intention, yes, sir.

Q. Did they give you a bid for the corrected specifications? A. Never gave me a bid at all.

Q. Do you know of their having given any bid?

A. I have no idea.

Q. Did the company? [201]

A. I have never seen any such bid.

Q. Then these notations that were made on the margin in pencil opposite item six were correct, was it not?

A. I do not know. I do not know anything about the marginal notes.

Q. Let me read it to you: "Only as from B. of P. and B. of F. H." Would you say that only meant from break of poop to break of fore-castle-head? A. I do not know. I never saw that.

Q. Don't you usually abbreviate "F. H." for fore-castle-head? A. No, I never did.

Q. What would you use? A. Write it out.

Q. Always write it out? A. Yes, sir.

Q. Will you take your supplementary report, Mr. Walker. Where is the original of that report?

A. I do not know. It was handed to the owners of the ship when I wrote it.

Q. Mr. Thorndyke? A. Yes, sir.

Q. Did you deliver this one to him in the last two or three days, this copy? A. No, sir.

Q. A specific number of items—"The following additional items of repair I also consider necessary

(Testimony of Frank Walker.)

to make ship seaworthy": "Make new foreyard to take place of the yard now in place, which is sprung, using old iron work and send yard up complete." "Fit hardwood battens over chafed spot in foremast, occasioned by chafing of jam of gaff." [202] Now, that chafing or jamming of gaff was not due to the trouble this vessel got into after leaving Astoria, was it?

A. I could not say. It may have been partly.

Q. Can you say with certainty that it was due to that or was it due to previous wear of the vessel?

A. Due to the working of the gaff on the mast. When the gaff was working on the mast at that time it might have caused part of it.

Q. You were not present to know that that is the fact? A. No, sir.

Q. Then your statement was correct when you said that part of this supplementary report was a duplication of the work provided in the original report?

A. The report speaks for itself.

Q. Just answer the question.

A. I made a slight error in it.

Q. That is what I want. And the same thing is true with regard to the foreyard?

A. The foreyard was not damaged at that time. The foreyard was an old damage.

Q. So that is a repair not caused by the trouble the vessel got into?

A. We never claimed that it was.

Q. That is why you separated the preceding items from the latter items by the qualification "The fol-

(Testimony of Frank Walker.)

lowing additional items of repair I also consider necessary," etc.?

A. They were minor items there.

Q. If this vessel had been repaired at the time the specifications were drawn up, she would have been repaired under [203] the supervision of the owners' representative would she not?

A. Yes, sir.

Q. That is customary in the making of repairs on vessels, is it not? A. It is.

Q. It was contemplated at the time bids were called for, that the vessel would be repaired at the Port of Portland's Drydock, so far as the docking of the vessel was necessary, was it not?

A. I do not know anything about arrangements of that kind.

Q. Did not you draw this note to the bidders which so provided, which was sent out with the specifications, marked exhibit "1"?

A. No, I had nothing to do with that.

Q. Outside of the machine-shop work that would be necessary on the iron work on the vessel, and the legs or derrick necessary to ship the new masts going into the vessel, could not most of the work of repairs, for the wood repairs, be done aboard the vessel itself, or at the dock alongside of the vessel?

A. Yes. Except the rigging and that is done in a loft.

Q. The wire rigging?

A. Yes, and they have to have certain facilities for handling the wire.

(Testimony of Frank Walker.)

Q. And for making the sails? A. Yes, sir.

Q. The other work could be done by a competent ship's carpenter with the usual tools used by ship's carpenters?

A. The woodwork could be done, yes. [204]

Mr. CAMPBELL.—I offer in evidence identifications 2, 3, 4 and 5.

Mr. CLISE.—I would like to know the date they were taken.

Mr. CAMPBELL.—They were taken May 6th, 1912

Mr. CLISE.—No objection.

Photographs marked Defendant's Exhibits "2," "3," "4," and "5," filed and returned herewith.

Q. Did you keep, Mr. Walker, a copy of the memorandum that was entered into between yourself and Captain Gibbs on March 27th?

A. I haven't one with me. I think I have in my office.

Q. I show you a paper that has been marked "5a" for identification. I would like to ask you if the "renewal of mast steps" which in this agreement you and Captain Gibbs stated you considered unnecessary, were provided for in the original specifications?

Mr. CLISE.—I wish to object upon the ground that it is not proper cross-examination, and is taking up matters that the witness was not examined concerning in chief.

Mr. CAMPBELL.—All right.

(Testimony of Frank Walker.)

Redirect Examination.

Q. (Mr. BOGLE.) Mr. Walker, you were asked on cross-examination concerning the navigation of the Columbia River from Astoria to St. Johns. Does the river have channels that are navigable and bars or shallow points along the river that are not navigable?

A. Well, there are shallow points along the river in many places that are dangerous to navigation.

Q. And a vessel navigating up the river would have to keep [205] fairly within the channels of the river, deep channels of the river?

A. If the channel is properly followed there is not much danger.

Q. At the time this vessel was lying at Astoria, when you saw her in October, 1911, you say that she was full of water, or what was her condition?

A. She had same water in her. I do not know whether she was full. I do not think she was full at the time; she was not making water then.

Q. What was her condition with respect to being safely towed through the narrow channels of the river?

A. Well, with water in a ship she would steer badly.

Q. Would there be danger of her grounding on the bars of the river?

A. There would be, yes, sir.

Q. Your attention has been called by Mr. Campbell to the partial duplication in the supplemental report of survey of these repairs recommended in

(Testimony of Frank Walker.)

the original survey. Referring to that particular item wherein there is a duplication, what is the percentage of the duplication?

Mr. CAMPBELL.—I object, unless the question is made more specific. There are several items duplicated.

Q. Which was the first item of your supplemental report where you said there was a partial duplication of the original report?

A. The first item is caulking entire hull.

Mr. CAMPBELL.—That is subject to agreement later on.

Mr. BOGLE.—I will change the question.

Q. You have stated in your cross-examination that the item [206] in your supplemental report of survey, reading “Caulk entire main deck, including waterways and all under forecastle-head,” was a partial duplication of the recommendation of your original report. Can you express in the way of a percentage the extent of that duplication?

A. I should estimate it roughly to be four or five per cent. Not exceeding five per cent.

Q. You were asked also in regard to the item in your supplemental report reading “Fit hardwood battens over chafed spot in foremast, occasioned by chafing of jam of gaff.” You stated that this chafing was done partly before this accident and partly at the time of the accident. Was it in such a condition at the time you made this survey that it was necessary to be repaired in order to make the ship sound and safe for navigation?

(Testimony of Frank Walker.)

A. Yes, sir.

Q. Do you know personally the extent to which this particular damage had gone before the voyage begun?

A. No, sir; only by report of the master.

Q. What was his report?

A. Why, as near as I remember—

Mr. CAMPBELL.—I object as hearsay.

A. (Continuing.) The master reported to me that it had been very much increased during the time the gaff was working backwards at and after the disaster.

Q. Was the damage such that it would likely be caused by that rolling and chafing at the time of the disaster?

A. Any rolling and chafing, Judge. [207]

Q. (Mr. CAMPBELL.) Mr. Walker, when you first saw the “Nottingham” at Astoria, was the gaff in a position where it would chafe the mast?

A. I do not remember. I think the gaff was lowered down at that time.

Q. You do not know but what that gaff was lowered down when the trouble came?

A. I knew that sail had been very much used in trying to handle the ship after the disaster.

Q. From what the master told you?

A. And the jury rig that I saw at the time.

Q. Where was the jury rig at the time?

A. The jury rig was aft where she was trying to balance the vessel.

Q. The jury rig was not on on this occasion, was

(Testimony of Frank Walker.)

it? A. No, sir.

Q. Wherein would the wear and tear of the gaff on the mast be any different at that time than when the vessel was sailing in a similar gale of wind?

A. At this time the vessel was a total wreck, and she was left to the mercy of the winds at the time and the gaff was swinging forwards and backwards wildly.

Q. You do not know that?

A. Only by report.

Q. Hearsay,

A. The master claimed that all of the chafing was done at that time.

Q. Would that wear and tear on the mast be any greater than what the schooner would suffer with her sails set and rolling in a calm or when the wind was light? [208]

A. I could not say it would be any greater.

Q. How high was the place on the mast where the gaff fitted around it, from the deck?

A. Where the gaff chafed, the chafed spot?

Q. Yes. A. Under the hounds.

Q. I ask the distance, the height I ask you.

A. The mast is 112 feet long.

Q. I want your judgment.

A. I am trying to give it. About 40 feet from the deck.

Q. Was there any reason why the water could not have been pumped out of the "Nottingham" as she lay at Astoria?

A. The only reason was, there was nobody at-

(Testimony of Frank Walker.)

tempted to do it.

Q. Do you know whether any request was made by the Globe Navigation Company to the Port of Portland for permission to pump the water out of her?

A. I do not know anything about it.

Q. I will hand you a photograph and ask you if that shows the condition of the schooner's deck-load at the time that you first saw her?

A. A similar condition to that, yes.

Mr. CAMPBELL.—Have you any objection to that, Mr. Clise? It was taken at the time.

Mr. CLISE.—I understand it was taken while she was at Astoria?

Mr. CAMPBELL.—Yes, sir. I offer it in evidence.

Photograph marked Defendant's Exhibit "6," filed and returned herewith.

Q. I show you three other photographs and ask you whether they show the "Nottingham" as she was when you saw her at Astoria? [209]

A. This one is, as I remember her.

Q. How about the other two?

A. I did not see her under these conditions.

Mr. CAMPBELL.—I offer the one identified by the witness in evidence.

Mr. CLISE.—No objection.

Photograph marked Defendant's Exhibit "7," filed and returned herewith.

Q. (Mr. BOGLE.) Mr. Walker, who was in charge and possession of the "Nottingham" at the time you saw her at Astoria?

(Testimony of Frank Walker.)

A. There was a watchman on board. I was given to understand he represented the Port of Portland.

Q. Do you know whether the vessel had been seized under a libel at that time?

A. I think she had.

Mr. CAMPBELL.—We will admit that.

Q. And was in possession of either a Government official under the libel or of the salvors at that time?

A. That is the way I understood it, yes.

Q. Did you have to get permission from someone to get aboard?

A. Mr. Thorndyke obtained that permission.

Q. Who from?

A. I do not know. I think from the Port of Portland or their attorney.

Q. You were asked whether the owners made any request for permission to pump her out. You say you know nothing about it. Do you know whether the underwriters made any attempt to pump her out?

A. I do not think they did. I do not think anybody did.

Witness excused. [210]

**[Testimony of George F. Thorndyke, for Plaintiff—
Cross-examination.]**

Mr. GEORGE F. THORNDYKE, on the stand for further cross-examination:

Q. (Mr. CAMPBELL). Have you the information called for yesterday?

A. The "Nottingham" was salted in May, 1908,

(Testimony of George Thorndyke.)

before this accident. She was docked in April, 1911. She was caulked in April, 1907.

Q. What part of her was caulked in April, 1907?

A. I think her hull was all caulked. It was done in East Boston.

Q. From the bulwarks down?

A. The whole hull.

Q. When were her decks last caulked?

A. You did not ask me that yesterday. I could not say. I did not look it up.

Q. Kindly look that up so as you can supply it.

A. She was caulked after a collision with an iceberg off Cape Horn, thoroughly, and repaired at East Boston and thoroughly repaired.

Q. Probably her decks were recaulked at the same time her bottom was recaulked. A. Very likely.

Q. Of course her bottom was repainted at the time she was caulked? A. Oh, yes.

Q. She was last painted when she was last docked.

A. She was painted in April, 1911.

Q. Did you get any bids on the supplementary report of Walker, other than from Hall Brothers?

A. I do not know. I think I talked with Walker and Captain [211] Gibbs about that. And I think Gibbs stated that he thought Hubbard would give a fair estimate and that would be all that was necessary.

Q. Did you ever furnish a copy of that supplemental report to the Firemen's Fund Insurance Company?

A. I have no recollection of having done so.

(Testimony of George Thorndyke.)

Q. You refused to do so?

A. I do not remember of having refused to do so.

Q. Wait a minute. I will see if I can refresh your memory. Do you recollect in June, 1913, a request being made to you by the Firemen's Fund Insurance Company, through the firm of Johnson & Higgins, whom you had appointed to make up the general average adjustment on the "Nottingham," a request for a copy of this supplemental report?

A. I do not remember it. I do not deny it.

Q. Do you not remember writing them a letter refusing to furnish the Fireman's Fund Insurance Company a copy of that report?

Mr. BOGLE.—If there is such a letter in existence it ought to be produced.

A. I do not remember it at this time.

Q. Did not you write them as follows: "As the survey of March 27th referred to by you is signed jointly by Mr. Walker and Captain Gibbs, the San Francisco Board probably have a copy which would be available for examination; but the survey of the 4th of March is signed only by owners, Surveyor, Mr. Walker, and as charges in adjustment are not based upon that survey, we see no reason why the Firemen's Fund should require it, and for that reason we will not submit the report of survey of March 4th to them." [212]

A. If it is that letter—

Q. Don't your recollection go back until about the 14th of June so as to recollect whether or not you wrote that letter to Johnson & Higgins?

(Testimony of George Thorndyke.)

A. Of this year?

Q. Yes, sir.

A. I could not positively state that I did write that letter. I remember something coming up in connection with it, and just whether I wrote that letter or not, I do not know. If I wrote it, it speaks for itself.

Q. Who placed the insurance on the "Nottingham" before you were directly insured here by the Firemen's Fund Insurance Company?

A. Various companies that I remember, through Johnson & Higgins, of course.

Q. Through Johnson & Higgins as of course?

A. As I remember it.

Q. Have you any of these policies that were placed at that time? A. I think so.

Q. I wish you would produce them to me. Did you ever make a request of the Port of Portland for permission to pump the water out of the "Nottingham," while she was lying at Astoria, prior to the time of her towage to St. Johns drydock?

A. I think not.

Q. You know in fact she was pumped out, don't you?

A. I do not. I was not present when she was started.

Q. Who made up the general average adjustment on the "Nottingham," in which were embodied the disbursements and [213] losses resulting from this trouble? A. Johnson & Higgins.

(Testimony of George Thorndyke.)

Q. What business is the firm of Johnson & Higgins in?

A. Insurance brokers and marine adjusters.

Q. They are the leading firm of marine adjusters on this coast? A. I think so, undoubtedly.

Q. Thoroughly competent in every particular to make up adjustments, in your judgment?

A. I have always judged them so, given them our business.

Q. You appointed them adjusters in this particular case, didn't you? A. We did.

Redirect Examination.

Q. (Mr. CLISE.) Mr. Thorndyke, you have spoken about the "Nottingham" being recaulked in Boston in the fall of 1907? A. Yes, sir.

Q. When did she return to Seattle?

A. She was recaulked, I think, in the spring of 1907, and she arrived here early in 1908.

Q. After her arrival here did you have any repairs made to her? A. Yes, sir, extensive repairs.

Q. What repairs, for instance?

A. I do not remember all of them, but one thing particularly. She was worn down along the water-line for several strakes of plank on both sides and we removed the planking and replaced it with new.

Q. Was she placed on a drydock? [214]

A. Probably not. She was affected at the load water-line and the repairs could be made while she was in the water without drydocking her; and that planking was all recaulked and recemented and painted at that time.

(Testimony of George Thorndyke.)

Q. Then there was a certain amount of recaulking done then along about May, 1908? A. Yes, sir.

Q. Now, referring to this supplementary report, that is Plaintiff's Exhibit "J," was that ever submitted to any representative of the Firemen's Fund Insurance Company? I will ask the formal question: During the winter and spring of 1912, were any negotiations entered into with the Firemen's Fund, looking to a settlement or adjustment of the dispute occasioned by the disaster to the "Nottingham"? A. Yes, sir, as I remember.

Q. You have testified that you went to San Francisco, and that I went to San Francisco, in an endeavor to adjust these matters?

A. Yes, sir.

Q. Now, then, were there any efforts made with any representative of the Firemen's Fund Insurance Company here in Seattle, in regard to making a settlement and adjustment? A. Yes, sir.

Q. Who?

A. I think we met Mr. Taylor and Mr. Page and Mr. Campbell. You and I met Mr. Page and Mr. Campbell and Mr. Taylor of the Firemen's Fund once in the Colman building in this city about that time.

Q. Now, I will ask whether or not this supplementary report [215] survey, Plaintiff's Exhibit "J," was submitted to any representatives of the Firemen's Fund Insurance Company?

A. It certainly was. Captain Crow was at that meeting, too, if I remember.

(Testimony of George Thorndyke.)

Q. Was it ever submitted to Captain Gibbs?

A. I do not know. I do not remember.

Q. (Mr. CAMPBELL.) Did you ever submit it to Captain Gibbs? A. I do not remember.

Q. (Mr. CLISE.) Now, Mr. Thorndyke, I will ask you whether or not it is not a fact that in the spring of 1912, a conference was held in my office in the New York block, attended by you and Mr. Campbell and Mr. Page and Judge Bogle and myself, in which this very supplementary report was discussed and an endeavor made to arrive at an agreement in regard to various matters and items mentioned in that supplementary report?

A. I think it was during the evening time.

Q. At that time or any subsequent did they say that they would appoint some person here in Seattle to represent them, to confer with Walker, our surveyor, with reference to the various items contained in that supplemental report?

A. I do not remember that they did.

Q. (Mr. BOGLE.) Mr. Thorndyke, did they not appoint Captain Gibbs to confer with Mr. Walker, and did not he go down and examine the ship?

A. Yes, sir.

Q. To see whether he concurred in this supplemental or not?

A. Yes, sir. I was wrong about that.

Q. (Mr. CLISE.) Do you wish to correct the statement that you [216] just made then?

A. I do.

Q. What do you wish to say in regard to it?

(Testimony of George Thorndyke.)

A. I wish to say that Captain Gibbs was appointed as a result of that meeting and went to Portland, accomponied by Mr. Walker and myself, and boarded the "Nottingham."

Q. Was a copy of that supplemental report furnished Captain Gibbs? A. Yes, sir.

Q. For his examination?

A. Yes, undoubtedly. It was signed by him as I remember.

Q. Now, during the time the vessel was at Astoria, did you, representing the owners, exercise any act of ownership whatsoever with regard to that vessel?

A. No.

Q. You have testified you did not have her pumped out at Astoria. The fact that you did not exercise any act of ownership is the reason you did not have her pumped out?

A. I had nothing to do with having her pumped out.

Q. (Mr. CAMPBELL.) The reason you say that this supplemental report was furnished Captain Gibbs, was because his name was signed to it, is that your statement?

A. I think his name is. I will explain, Mr. Campbell. There are two supplemental reports. There are other reports than the first one mentioned made out by Walker, one of these reports has Captain Gibbs' signature.

Q. That is the one you are talking about that was furnished Captain Gibbs, is it not?

Mr. CAMPBELL.—This has not been offered in

(Testimony of George Thorndyke.)

evidence. I [217] now offer it in evidence.

Mr. CLISE.—I object as incompetent, irrelevant and immaterial and not identified, as the signatures have not been proved.

Paper marked Defendant's Exhibit "5a," filed and returned herewith.

Q. (Mr. CAMPBELL.) The supplemental report you are speaking of furnished Captain Gibbs is the one marked exhibit "5a," is it not?

Mr. CLISE.—Examine the report before you answer.

A. I do not think there is any doubt, Mr. Campbell, but what Captain Gibbs had a copy of that report and also the other one.

Q. Will you answer my question. The report you are speaking of having been furnished Captain Gibbs was a copy of the report marked exhibit "5a"?

A. I refer to both of them, as explained to you. There were two supplemental reports.

Q. Why did you state to me a while ago that you had no recollection of the report of March 4th being furnished the Firemen's Fund Insurance Company, and now after examination by your counsel, you change it?

A. Because I had in mind then Mr. Taylor as being Firemen's Fund Insurance representative and not Captain Gibbs.

Q. You want to go on oath at this time that you furnished Captain Gibbs Walker's report of March 4th?

(Testimony of George Thorndyke.)

A. I did not say that. I have no doubt but he had it.

Q. You have no recollection of it, have you?

A. No.

Q. Why do you hesitate? [218]

A. I am trying to think. Give me a chance to think.

Q. I am giving you all the opportunity you want to think.

A. I do not remember personally giving the Firemen's Fund a copy, though I may have done so.

Q. If you did so, why did you refuse through Johnson & Higgins on June 17th or thereabouts, to furnish us a copy of it?

Mr. BOGLE.—I object, because the witness has not said that he refused to give them a copy of it.

Mr. CAMPBELL.—We will produce the original letter unless it has been lost; if it has, we will prove the copy of it.

Q. Before you wrote this letter in June you conferred with your counsel, and it was on his instructions that you refused?

Mr. BOGLE.—He has not said that he wrote such a letter in June or any other time.

Q. You cannot recollect that either?

A. I think I consulted counsel on that.

Q. Now, you do remember having written that letter to Johnson & Higgins, don't you?

A. I said in my former testimony that I had a recollection of something coming up where there was some document sent up here for. Whether that

(Testimony of George Thorndyke.)

is the one or not I could not say.

Q. Have you the letter Johnson & Higgins wrote you? A. I suppose I have.

Q. Produce it, please. Now, you do not mean to say that Captain Gibbs was appointed an arbitrator of the differences between the Firemen's Fund and your company, in our conference about the 1st of May, 1912, do you?

A. Well, my feeling was that he was appointed arbitrator of [219] the differences between Captain Crow and Walker.

Q. An arbitrator?

A. Well, harmonize, or whatever you call it.

Q. As a matter of fact you and Mr. Clise, I believe, I do not know whether he did or not, and Mr. Walker, went to Portland with Mr. Page and Captain Gibbs to meet Captain Crow and there went aboard the vessel and attempted to agree upon the differences that were set forth in the agreement between Walker & Gibbs, didn't you, shown in exhibit "5a"?

A. There were certain points of dispute between Captain Crow and Walker, as I recollect it. Captain Gibbs went down there to examine the vessel and harmonize and agree with Walker on these matters.

Q. Was he to have the deciding voice?

A. I do not know that he has in any matters.

Q. Did he in this arrangement, did he have the deciding voice?

A. Only as far as the custom. I think you would

(Testimony of George Thorndyke.)

follow the advice of your surveyor. I would take it so.

Q. Captain Crow and Captain Gibbs could not agree with Mr. Walker on that occasion, could they?

A. I think there were some disputes even then.

Q. These disputes centered largely around the depreciation of the hull by exposure to weather, above the water line, didn't they?

A. I do not remember now, Mr. Campbell. I have gone through a vast amount of matters since then.

Q. Was not that in dispute?

A. I would not say that. [220]

Q. Was there not a dispute also as to the effect on the deck by the weather? Were not these two points in dispute?

A. That may be the fact. Surveyors usually disagree and afterwards agree. I do not remember.

Q. Now, will you read the second page of the agreement of March 27th, and see if these were not the items, if it was not with respect to that disagreement between Gibbs and Walker, that you all went to Portland?

A. I could not say now that that was one of the points of dispute between Walker and Captain Crow.

Q. You have no recollection of that supplemental survey report of March 4th being before Mr. Clise, Mr. Page and myself and Judge Bogle and yourself, in Mr. Clise's office on that evening that we were in Mr. Clise's office, have you?

A. I do not remember, but the principal survey,

(Testimony of George Thorndyke.)

I do not even remember whether that was there or not.

Q. Did you ever furnish the Firemen's Fund Insurance Company a copy of the bid you obtained from the Hall Brothers marked Plaintiff's Exhibit "K"? A. I do not remember now.

Q. (Mr. BOGLE.) Mr. Thorndyke, you stated that you consulted with Captain Gibbs *with* respecting asking Hall Brothers for bids on that supplemental report of Mr. Walker, and that he stated that it would be sufficient to get their bid. Is that correct? A. That is as I recollect it.

Q. And was he at that time familiar with the report of Mr. Walker, upon which these bids were being invited? [221]

A. He must have been.

Mr. CAMPBELL.—I move to strike the answer as not responsive to the question.

Q. Mr. Thorndyke, referring to this conference that you have mentioned, in Mr. Clise's office, at which Mr. Campbell and Mr. Page were present on behalf of the Firemen's Fund, and you and Mr. Clise and myself on the other side, was not one of the points about which we were trying to get together, the question of the necessity of the repairs called for in Walker's supplemental report, and was it not understood at that meeting at that time, that Mr. Page and Mr. Campbell would get Captain Gibbs, representative of the Firemen's Fund, and go down to Portland and examine this ship, and see whether he would approve the representation of Walker's

(Testimony of George F. Thorndyke.)

supplemental report? Was not that why he did go down and make that examination?

Mr. CAMPBELL.—I object as leading.

A. Yes, sir.

Q. (Mr. CAMPBELL.) Why do you answer that question “Yes” after Judge Bogle propounds it in a leading form, when you could not answer it a moment before?

Mr. BOGLE.—I object as not a proper question. It is argumentative; there is nothing to show that he could not answer it.

A. As I said to you before, Mr. Campbell, I had a mass of matters in connection with the “Nottingham,” and there are some things that escape my memory until my mind is refreshed, until some instance is cited. And I had [222] forgotten, as I said, that I had met you and Page. It did not come to my mind that I met you and Page in Mr. Clise’s office. I remember it now. I have had recourse to my thinking faculties and remember the circumstances and generally what took place, and I now testify to that effect.

Q. When I propounded that question to you, you knew that that conference had taken place, didn’t you? A. It did not occur to me at that time.

Q. Was not my question directed to that conference and named the parties to it?

A. I do not remember that now whether you did.

Q. Your answer then to Judge Bogle’s leading question is not a fair answer to it, is it?

A. I think so.

(Testimony of George F. Thorndyke.)

Q. Is it not a fact that your recollection is very dim upon the subject?

A. It is getting clearer every minute.

Q. Assisted by counsel.

Mr. BOGLE.—I object, that is not fair to the witness.

Q. Now, do you have at this time, too, a clear recollection of the Walker survey report of March 4th, being before us at that conference?

A. Yes, sir, I have.

Q. Then why in June, 1913, did you refuse to produce a copy of it?

Mr. BOGLE.—There is no evidence that he did refuse to produce a copy of it. I desire the record to show that counsel bases his question on what purports to be a letter that he refuses and does not produce it or [223] furnish it to the witness.

Mr. CAMPBELL.—I will produce the letter on that request and ask that it be copied in the record and the original returned.

Q. Is it not a fact that in that conference what we were discussing was the difference between Gibbs and Walker, which was embodied in the agreement marked exhibit "5a."

A. I do not think so. I do not think we were discussing that.

Q. Don't you think you ever discussed that in substance?

A. I do not remember any conference in which it was ever discussed.

Q. You do not think any part of the matter con-

(Testimony of George F. Thorndyke.)

tained in the Walker-Gibbs agreement was ever discussed at that conference, do you?

A. No, I do not think that was in existence at that time.

Q. So that the discussion at the conference in Mr. Clise's office was on something that was entirely separate and apart and had no reference to exhibit "5a," the agreement between Gibbs and Walker?

A. As I recollect the conference it was—the idea was that Captain Gibbs should go to Portland with Walker and go over the vessel and harmonize the difference between Walker and Captain Crow, and these two gentlemen went down and I think you went and also Mr. Page.

Q. Answer my question. (Question read to witness.)

A. I think it had no reference to that.

Mr. CAMPBELL.—I will on the request of counsel produce the letter to which I have been referring and as embodying Mr. [224] Thorndyke's and the Globe Navigation Company's refusal to produce the survey report. And I now produce the letter and ask it be copied into the record and ask permission to withdraw the original for further use in taking depositions in San Francisco. If counsel desires the original letter in the files of the case we will return it, together with the depositions to be taken in San Francisco.

Mr. BOGLE.—I object to the letter produced and offered in evidence, for the reason that it purports to be a letter from Johnson & Higgins, written by

(Testimony of George F. Thorndyke.)

Mr. Bishop of San Francisco, to the Firemens' Fund Insurance Company, and does not purport to be a letter written by Mr. Thorndyke or the Globe Navigation Company. The statements in that letter as to purported contents of some communication of the Globe Navigation Company is pure hearsay.

Q. Do you know the signature of John A. Bishop?

A. No, I would not testify to it. I have seen it.

Q. How many letters have you ever had from Mr. Bishop?

A. Oh, I might have had three or four.

Q. All the time you have been dealing with Johnson & Higgins and their adjustments, you only had three or four?

A. You asked my recollection. That is all I can say now. A good many letters come from Johnson & Higgins that are not signed by Bishop.

Q. Do you know his signature?

A. Some are signed by—

Q. Do you know Bishop? [225]

A. Very well.

Q. He is an employee of Johnson & Higgins?

A. Yes, sir.

Q. In charge of their adjustment department?

A. I assume he is.

Q. Will you later produce the original letter which you received from Johnson & Higgins requesting a copy of the Walker report of March 4th, together with your office copy of your reply thereto?

A. Yes, I will get a copy of that letter.

(Witness excused.) [226]

**[Testimony of Frank Walker, for Plaintiff—
Cross-examination.]**

FRANK WALKER, on the stand for further cross-examination:

Q. (Mr. CAMPBELL.) I hand you identification “5a,” and ask you if that is your signature to it?

A. Yes, sir, that is my signature.

Q. You joined in that agreement with Captain Gibbs? A. Yes, sir.

Mr. CAMPBELL.—I now offer it in evidence.

Paper marked Defendant’s Exhibit “5a,” filed and returned herewith.

Redirect Examination.

Q. (Mr. BOGLE.) Mr. Walker, this document that you have just identified, purports to be signed by yourself and by Captain Gibbs, on March 27th, 1912. At the time you made the examination embodied in that report, had Captain Gibbs been furnished with a copy of your supplemental survey of March 27th, and been advised of the contents of that survey?

A. Yes, sir, I think I handed Captain Gibbs a copy of my survey, myself.

Q. What called forth this action by yourself and Captain Gibbs?

A. There was a controversy between Captain Crow and myself regarding the items mentioned here.

Q. Are these items mentioned in your supplemental report?

A. Partly. The first page has nothing to do with my supplemental report. The second page has.

(Testimony of Frank Walker.)

Q. Was it or not your understanding at the time you and Gibbs were designated to make this third survey or [227] report, that one of the principal objects in view was to see if Captain Gibbs would agree with your recommendations in your supplemental report?

Mr. CAMPBELL.—I object to that as calling for a conclusion of the witness.

A. The work called for in my supplemental report was part of our conversation and negotiations at this time.

Q. Do you remember whether at the time you and Captain Gibbs were making this survey, or at the time you made the trip down for that purpose, you had a copy of the supplemental survey with you?

A. I cannot say that I did.

Q. (Mr. CAMPBELL.) What you went to Portland for was an attempt to reconcile the difference between yourself and Captain Gibbs and Captain Crow, by an actual inspection of the vessel on the ground, with respect to these matters which are contained in the second page of this Gibbs agreement?

A. No, it was some other items objected to by Captain Crow, after agreeing with me on every item, afterwards he objected *he objected* on the first page of that agreement.

Q. What do you mean by agreeing on every item?

A. When I drew up the first specifications Captain Crow agreed with me that every item in the first specifications were necessary and correct.

Q. That was the agreement at the time?

(Testimony of Frank Walker.)

A. And after bids were called for Captain Crow made objections that are contained on that first page. [228]

Q. And you and Captain Gibbs then got together and agreed in accordance with the terms on the first page? A. The whole of that document.

Q. But in accordance with the terms on the first page? A. We agreed as that document states.

Q. This document, the first item provides that you consider unnecessary the renewal of the mast steps.

A. Yes, sir, just as it states there.

Q. That was covered by the original specifications?

A. Yes, sir.

Q. That provided for the renewal of the mast steps?

A. Yes, sir. Of course, at the time of the first specifications, while they were drawn up they were an unknown quantity.

Q. The lumber was out of her, was it not?

A. The lumber was out of her.

Q. They were so that they could be inspected?

A. They were unknown until the masts were removed.

Q. They could be inspected before the masts were removed? A. No.

Q. Was there any difference in the opportunity to inspect them in December when you drew up the original specifications, than in May when you visited the vessel?

A. The difference was we could not see what the

(Testimony of Frank Walker.)

steps were like until the stumps were removed entirely.

Q. Were they removed when you agreed to this agreement? A. No.

Q. So at the time you agreed to this agreement you had no more information?

A. We had a little more. [229]

Q. You had no more information when you entered into this agreement on March 27th, than you had in December when you drew your original specifications, had you?

A. No more information between those dates.

Q. The original specifications call for painting of the deck, didn't they? A. Yes, sir.

Q. And the original specifications called for two coats of copper paint on the bottom? A. Yes.

Q. And by this supplemental agreement you take out of the original specifications, one foresail, one foregaff-topsail and one forestaysail, which you estimate to be valued at \$475.

A. Just as that states.

Q. And by this original agreement of March 27th, you eliminate three gafftopsails, don't you?

A. Just as it states, I cannot say what it says there now.

Q. You may look at it.

A. I say just as it states there; I agreed to it.

Q. The original specifications provided for seven gafftopsails, didn't they? A. Yes, sir.

Q. The original specifications provided for the renewal of a cast-iron chock and stanchions?

(Testimony of Frank Walker.)

A. Yes, sir.

Q. You took these out of the original specifications by this.

A. That was an item also agreed between us did not belong to the damage of the disaster. There was no question [230] on that item.

(Witness excused.) [231]

Seattle, Washington, August 30, 1913.

Present: Mr. CLISE and Mr. BOGLE, for the Plaintiff.

Mr. CAMPBELL, for the Defendant.

[**Testimony of Capt. A. W. Swenson, for Plaintiff.**]

Capt. A. W. SWENSON, a witness called for on behalf of the plaintiff, being duly sworn, testified as follows:

Q. (Mr. CLISE.) State your business and your age? A. Fifty-four.

Q. What is your occupation?

A. Master mariner.

Q. How long have you been a master mariner?

A. Twenty-six years.

Q. What craft?

A. Sailing vessels and steamers.

Q. In what waters? A. On the Pacific Ocean.

Q. How long were you master of the "William Nottingham" prior to October, 1911?

A. Three years.

Q. To what ports had you made voyages in the "Nottingham"?

A. On the west coast of South America and Australia.

(Testimony of Capt. A. W. Swenson.)

Q. You were in command of the vessel and in charge of the loading of her cargo at Westport, just prior to October, 1911? A. Yes, sir.

Q. What cargo did she have on board, just generally? A. At this time?

Q. Yes.

A. Mixed cargo of lumber and timbers and small stuff. [232] Some big timbers and some small.

Q. Above and below decks?

A. The big part of the timbers was on deck.

Q. I wish you would describe just how the cargo was stowed on deck?

A. Well, it was stowed so as to clear everything. It is pretty hard to describe without a diagram of some kind.

Q. Captain, I will show you a paper called "Globe Navigation, schooner 'William Nottingham,' " and ask you if that is a sketch of her deck plan?

A. Practically, yes.

Mr. CLISE.—I offer this in evidence.

Tracing marked Plaintiff's Exhibit "L," filed and returned herewith.

Q. Describe how you stowed that cargo on deck using this exhibit "L."

A. The sides of the ship here are all clear. We stowed the lumber, commencing usually aft, and just run the lumber from aft to forward until it comes to this point here.

Q. That would be from the poop up to the fore-castle? A. From the poop to the fore-castle.

Q. Now, was this lumber stowed along the sides

(Testimony of Capt. A. W. Swenson.)

in one continuous pile, or were there broken spaces between?

A. There were some broken spaces, but we endeavored to put it down as close together as possible, that is as far as the stowage would allow us. The lumber is different sizes and therefore we have to try to match it as much as possible in order to get it to fit together as it has to be level at all times.

Q. Where it was piled along the sides here, is there any [233] opportunity for the water to wash across the deck between the timbers?

A. Very little.

Q. Very little?

A. I will state here, that abreast of the pump there is left usually a space, so I usually use a space of four inches to allow the water to run out from the pump when pumping her out; that is about all the space that is left there.

Q. Otherwise the lumber is more or less continuous? A. In a solid mass.

Q. Now, then, did you stow the lumber across the entire deck, over the hatches and everything?

A. Yes, sir.

Q. If you stowed it over the hatches will you describe how you did it?

A. We stowed it in between the hatches until it comes up about four inches above the coaming of the hatches, then we put the biggest kind of timbers right across the hatches over this planking on to the solid parts of the lumber that has been put there for that purpose.

(Testimony of Capt. A. W. Swenson.)

Q. Then you put your heaviest timbers right across the various hatches and pile the lumber on top of that?

A. When we get the hatches covered, then we stow the lumber right across all the time, just keep on from one side. There are two gangs of men working usually. One gang works from this side and the other from the other side and they meet in the center.

Q. (Mr. CAMPBELL.) Do you lay the plans athwartships or fore and aft? [234]

Q. (Mr. CLISE.) How high was the lumber piled on the deck?

A. I think the report says 13 feet six inches. Something like that. I cannot remember.

Q. That is approximate. A. Yes, sir.

Q. It is the usual method of stowing lumber aboard schooners of this character?

A. That is the usual method, yes.

Q. After you had your cargo towed did you have a survey made? A. Yes, sir.

Q. And report?

A. A survey was made in Astoria, not at Westport.

Q. And was that in writing? A. Yes, sir.

Q. Was that delivered to you by the man making the survey? A. Yes, sir.

Q. Is this the paper that was delivered to you at that time? A. Yes, that is the paper.

Q. Who gave it to you?

A. A man by the name of Cherry.

Mr. CLISE.—I offer this report in evidence.

(Testimony of Capt. A. W. Swenson.)

Mr. CAMPBELL.—I object as hearsay and being evidence of transactions with an outside person.

Paper marked Plaintiff's Exhibit "M," filed and returned herewith.

Mr. CLISE.—I intended to agree with you that Captain Crow's report should go in and not make the objection because of it being a report made by a deceased person. [235]

Mr. CAMPBELL.—If we can agree on that, then I will withdraw this objection.

Mr. CLISE.—Will you admit that this is Captain Crow's signature to this report?

A. (Mr. CAMPBELL.) Yes, I think it is. I will admit that is his signature.

Q. On your way from Westport to Astoria you went aground, did you? A. Yes, sir.

Q. Now, after you were at Astoria, did you have the vessel surveyed again? A. Yes, sir.

Q. And was the report of that survey in writing? A. Yes, sir.

Q. And is this the written report that was given to you after you reached Astoria? A. Yes, sir.

Mr. CLISE.—I offer this report in evidence.

Mr. CAMPBELL.—I offer the same objection as to the other report, subject to any arrangement that may be made later.

Paper marked Plaintiff's Exhibit "N," filed and returned herewith.

Q. Captain, what happened when the vessel went aground between Westport and Astoria?

A. She was left aground over night. Finally

(Testimony of Capt. A. W. Swenson.)

pulled off by the assistance of two tugs.

Q. Where was it that you went aground?

A. At the entrance of the slough to Westport.

Q. What was the state of the tide when you went aground? [236] A. High tide.

Q. Did you stay aground until the next high tide?

A. Yes, sir.

Q. And you did not float? A. No, sir.

Q. Do you remember what time you left Astoria?

A. On the 2d day of October, 1911.

Q. You took your cargo at Westport?

A. Yes, sir.

Q. And fully completed your loading at that point? A. Yes, sir.

Q. (Mr. CAMPBELL.) Is Westport above or below Astoria? A. Above Astoria.

Q. Is there not a place of that name below Astoria?

A. I have heard the name mentioned—I do not think it is Westport but Freeport.

Q. (Mr. CLISE.) How far above Astoria is Westport?

A. In miles I could not say. We took about four hours in going up. I did not time her coming down.

Q. (Mr. BOGLE.) This survey report, the last one, was made at Astoria, after you were fully loaded and had been stranded and pulled off and then moved down to Astoria?

A. That was the final survey.

Q. The report that you just handed in.

A. Yes, the last one, that was made at Astoria.

(Testimony of Capt. A. W. Swenson.)

Q. (Mr. CLISE.) Now, Captain, describe your voyage from the time you left Astoria up until the time you abandoned the vessel?

A. Well, on leaving, the weather was fair with southerly wind? The bar was kind of rough, but not rougher than [237] we could safely go out. Nothing unusual happened on standing off shore. After I got out and everything was straightened up on deck, I told my mate to sound the pumps, and he sounded the pumps and he found fifteen inches in the well.

Q. Had you examined the vessel after she was loaded and prior to leaving Astoria?

A. Yes, sir.

Q. What condition did you find her in prior to leaving Astoria?

A. I found nothing wrong with her. She was making no water, practically tight.

Q. And was this at Astoria that you made the examination? A. Yes, sir. Shall I continue?

Q. Yes, go on.

A. I told the mate to send the men to the pumps and pump her out. You will understand 15 inches of water after a vessel has been lying in port for a time and not been pumped out since she arrived, is a normal amount of water to be in a vessel. So I did not feel uneasy. And then pumped her out. And four hours after I sent down to try the pumps again, and it took a little longer than usual. But sometimes there is a lot of drain from the different parts of the ship that causes probably the water to

(Testimony of Capt. A. W. Swenson.)

drain through the wells, and the men might not have pumped as hard as others would and it might take a little longer, I thought, to pump her out than it should have done. And this continued on, although I did not feel uneasy. But after about two days it took them about an hour every four before they could get [238] her free from water. This did not make me feel uneasy at all because we had quite a breeze of wind blowing about thirty-five miles an hour or so, but with the shift of wind, the wind shifted to the southwest somewhat, and the wind increased and compelled me to put the vessel on the starboard tack. As I was well off shore I could afford to stay on the starboard tack down the coast. There is a part of my report which I omitted which I would like to state here, if I may be allowed to; things slip a man's memory sometimes but will come back afterwards. When I put the vessel on the starboard tack the sea was pretty rough, and she took an unusually heavy lurch to port, and the deck load shifted the least bit. I did not feel uneasy then at that time, but it showed afterwards that it complicated matters considerably, as she commenced to make water very freely. I tried to examine where this water came from. Well, the water was coming in one place and I went to examine, this was the break of the poop, in the storeroom under the break of the poop, that is what is called the half deck, and I found the water.

Q. Now, Captain, referring to Plaintiff's Exhibit "L," will you indicate on this plat where this break

(Testimony of Capt. A. W. Swenson.)

occurred. Take a pencil and draw a line out here and mark it with an X.

A. This is the break of the poop marked X.

Q. The line extending across the vessel near the poop-deck which you have marked with two X's indicates the break of the poop?

A. Yes. The space below the break of the poop we call [239] the half deck, where we keep stores, etc.

Q. That is beneath the main deck?

Q. That is beneath the main deck.

Q. Now, continue.

A. I found the water that was coming in there—well, in fact it was pouring in from above into this half deck through the break of the poop on the port side.

Q. Now, did this lurch of the cargo do any damage?

A. Not at the time, not that I know of. I also went forward and found that the galley was flooded, afloat with water, coming in somewhere, through the shifting of the deck-load.

Q. Where is the galley situated?

A. The galley is situated right there.

Q. Mark that. A. I have marked it with a G.

Q. That is situated under or above the main deck?

A. Above the main deck. Now, the water was coming in here.

Q. Mark that point with a Y where the water was coming in near the galley.

(Witness does so.)

(Testimony of Capt. A. W. Swenson.)

Q. Proceed now.

A. It was filling up the galley to such an extent that it drove the cook out of there, he could not stay there. That came through the quick work. The quick work opened up and let the water in there. I could not tell how far the damage went down, I could not say, but the probability is it opened down between the main rail and the covering board, down between the timbers.

Q. What was the condition of the sea at this time?

[240] A. It was rough, very rough.

Q. Would the water come over the decks?

A. Not over the decks, no, but it came over the rails and went over the decks.

Q. Would that flood the main deck?

A. Not very much, no. The vessel laid over considerably, most of the water was all on the lee side. This vessel takes very little water over her from the weather when lumber loaded.

Q. How would the water get into these places that had been opened up?

A. From the lee side, from the port side. The wind was over the starboard side and the vessel laid over on the port side. And the lying over caused this part to get under water.

Q. Would this part be under water?

A. Partly.

Q. Sufficient so as to take in the water that you have indicated? A. Yes.

Q. When this increase of water came in were you able to handle it with the hand-pumps?

(Testimony of Capt. A. W. Swenson.)

A. That is the time I found out. I sent the men down there and kept them down there and they worked there for four hours and no sign of suck in the pump, that is the way we put it, that is they were not able to get her free.

Q. What did you do then?

A. Then I ordered the mate to start the steam-pump, and something happened to be wrong with the steam-pump, I could not tell just what it was. It happens sometimes [241] that a piece of wood or something gets in the valve and clappers and prevents the pump from doing its proper work, and it is hard at times to find out just what it is or to locate it. Sometimes have to take the pumps all to pieces entirely in order to find out. Other times it clears itself and works without any trouble.

Mr. CAMPBELL.—I move to strike the conclusions of the witness.

Q. When did you last use this steam-pump?

A. At Astoria before leaving.

Q. In what condition was this pump at that time?

A. Apparently in good condition. But I will state here that I did not use the pumps for the purpose of pumping the vessel out. We used it for washing her down. That is I had an additional suction-hose on to the pump and lead it over the side and closed the valve of the pipe that lead down in the hold. And apparently the pumps were in good condition, pumping the water over from the side of the ship washing down the vessel.

Q. Anticipating somewhat Captain, later the

(Testimony of Capt. A. W. Swenson.)

pump was in such condition that you could use it?

A. Well, they got it in good order to be used, we worked with them considerably, but I do not remember whether they were taken to pieces or not. I cannot call that to memory, but it was sometime before they did get them to work.

Q. Did you find any mechanical defect or anything of that sort? A. No, no.

Q. Now, to resume, when you found that the hand-pumps would not handle the water and the steam-pump failed to work. [242] what happened?

A. Well, I did not know anything about it, but I tried to get to port somewhere, where I could remedy this matter if possible.

Q. Now, what was the condition of the sea and wind during this time?

A. Oh, it was *winding* and was rough. We were under short sail, hove to.

Q. What sails did you have set?

A. I had double reefed mainsail and mizzen out, and the glass indicated still heavier blow than it was. As a matter of fact the wind subsided, the southerly wind, the southerly gale subsided almost to a calm, but the glass still kept on dropping, indicating some heavy gale from the opposite direction, so I did not attempt to make sail. I was at this time trying to run for Cape Flattery.

Q. How much water did you have in the vessel at this time?

A. I think I might have had—it is hard to sound, because she was lying over and I could not get the

(Testimony of Capt. A. W. Swenson.)

true sound, but she probably was half full—no, she could not have been half full, I do not think so.

Q. When was this, can you give the date?

A. It was on the 8th that I was took with this heavy gale, I think. Yes, on the 8th I was struck with the heavy gale coming from the northwest.

Q. This was after you had the southwest wind?

A. Southeast wind.

Q. The southeast wind, that continued with a heavy sea and then suddenly dropped? [243]

A. Yes.

Q. And how long afterwards was it before you got the wind from the northwest?

A. I had the southeast suddenly and the southwest wind from the 2d of October until the 8th of October.

Q. Do you remember about what time on the 8th of October the wind dropped before you got the gale from the northwest?

A. Well, it gradually died away on the 7th, about the end of the 7th, because I was anxious about any wind, I did not dare to put on sails because of the glass dropping.

Q. Did you or did you not continue to make water?

A. She still continued to make water, yes, and the men were down at the pumps all the time, up until the time—I don't just remember what time it was, they were getting the steam-pump to work, but I think my report shows the report given to the adjusters, I think shows the time. It was more fresh

(Testimony of Capt. A. W. Swenson.)

in my memory. My own report did not show that because I forgot it.

Q. During the time, after you found that the steam-pump would not work, did you endeavor to repair her?

A. Not until after the accident—do you mean the vessel or the pump?

Q. The pump.

A. We were working at the pump all the time.

Q. That vessel then, as I understand, was not entirely filled with water, but about half full of water up until the calm on the evening of the 7th or the morning of the 8th, is that correct?

A. Yes, sir, that is right. [244]

Q. Then the heavy gale from the northwest came on the 8th, did it? A. Yes, sir, on the 8th.

Q. About what time, in the morning or afternoon?

A. It was in the afternoon, just after noon, I think it was, if I remember right.

Q. When the gale struck you what did you do?

A. It came so suddenly it took one of my boats hanging in the davits, lashed with double lashing, it tores its lashing and threw it out on the water just like a sheet of paper, and the vessel, although she was on the right tack for the wind to strike the sails right, she almost went on her beam ends.

Q. What did you judge to be the force of the wind?

A. Oh, a hundred miles an hour, fully.

Q. Well, what did you do with the vessel then?

A. I tried to get her before the wind, but she was

(Testimony of Capt. A. W. Swenson.)

so slow in getting there that it was some time that she was throwing herself on her beam ends; after the first heavy wind she righted herself some, but during that heavy lurch she shifted her deck-load considerably and that complicated matters considerably. She would not answer to her helm. I tried all that night, tried to get on to the other tack, so that I could get, as we had been using the steam-pump at this time, but when she went over so much, the water came right up in the donkey-room and put the fire out and they were unable to keep up steam, and I was endeavoring to try to get her on the other tack so as to straighten her up and be able to pump her out. But I was unable as she did not seem to [245] answer. I put all sorts of sails on her, all the head sails I put on and tried to get her off around before the wind and off on another tack, but I was unable to do so.

Q. Now, you spoke of the steam-pump working. About when did you get the steam-pump to work?

A. I cannot remember, but it seems to me that we got the steam-pump to work—we had the steam-pump working, I think, on the 6th, but I am not clear on that point. I know it began working sometime before we struck that heavy gale.

Q. Now, did you make a written report immediately after you came ashore? A. Yes, sir.

Q. I hand you this paper and ask you if this is one of the reports which you made. Look and see if that is your signature to it.

A. That is my signature.

(Testimony of Capt. A. W. Swenson.)

Q. Is that one of the reports that you made at that time? A. Yes, sir.

Q. Now, I will hand you that paper for the purpose of refreshing your memory, and ask you to examine that so that you can be definite as to the time when the steam-pump started?

A. I think I left that out of that report. I know the steam-pump was working before the time stated there. That is the reason I am not clear on that point. I had so much to think of at that time that I let a lot of things go that probably should have been put in. But I know the steam-pump was working before this time. But I had [246] forgotten.

Q. The steam-pump was working before this heavy gale struck you? A. Yes, sir.

Q. Continue, Captain. You were describing how you were endeavoring to bring the vessel before the wind.

A. Well, I was unsuccessful in this, and as she laid over so much and the water got up and put the fire out in the donkey-room, I was unable to use the steam-pump any longer and the vessel continued to fill. I could tell by the feel of her that she was filling as she commenced to lay over more and more all the time. Early on the morning of the 9th I saw it was a case of having to do something in order to save ourselves, or save something of the vessel, save something of the cargo. I came to the conclusion that I would try to jettison the deck-load. I made preparations for this purpose, but before these preparations were completed she laid over so much the deck lash-

(Testimony of Capt. A. W. Swenson.)

ings parted. When the deck lashings parted, the deck-load took a slide to port and up against the rigging and carried away three masts, and the masts and the deck-load even with the rail went over the side. The wreckage was held by the forespringstay and in order to get ride of the wreckage I had to cut the springstays. I asked for volunteers and one man volunteered to go up on the foremast and cut away the forespringstay, and that relieved me immediately on the wreckage.

Q. What do you mean by cutting the forespringstay?

A. The spring stay, that is the stay that holds the masts [247] together. There is a stay between each mast, a heavy piece of wire that goes from one masthead to the other continuing from forward to aft. That holds the masts together. And the forward end, the one that was fast to the foremast, did not carry away as the masts went overboard, but held the wreckage alongside the vessel and it was necessary to have that cut away in order to clear the vessel from the wreckage.

Q. Now, what was the condition of the wind?

A. Well, the wind was very light then, light from the westerly; fine weather at that time.

Q. What was the condition of the sea?

A. The sea was quite heavy, quite a heavy swell, but it was smooth.

Q. Was that the condition of the weather at the time the deck-load went overboard? A. Yes, sir.

Q. What was the cause of the deck-load sliding off

(Testimony of Capt. A. W. Swenson.)

the deck of the vessel?

A. Why, the parting of the deck lashings and the masts carried away.

Q. What I wish to get at Captain is, what caused the lashings to part if the weather was so fine and the sea was not rough?

A. The heavy list that the vessel had to port, as she filled with water she listed so heavily; in fact she was going over all the time, and that is what I was afraid of, that she would turn over. That is why I made preparations to jettison the cargo, and I did not complete my preparations, as I stated before, before the deck [248] lashing parted, she laid over at such an angle, such a degree, that the deck lashing was not sufficient to hold the heft.

Q. About what angle was the deck at this time?

A. Well, at that time we could not stand on deck. We hung on like this to the upper rail. I could not say, it must have been 60° or more.

Q. Well, after you got the spring stay cut and rid of the wreckage, what did you do?

A. Well, then, we tried to ascertain if possible whether we could get the water out of the vessel, and try to find out the damage, etc., after she got straight and put the steam-pump to work again, why we started to pump her out, and we found that the water was coming through the holes in the side caused by the chain-plates tearing out, and we rigged a raft and went over the side and made plugs and plugged up all these holes. Then we continued to pump and we nearly succeeded in getting the water out of her. I

(Testimony of Capt. A. W. Swenson.)

had by this time set the sails. I had set the foresail and the forestaysail, and rigged some of it on the jury-mast that I put up in the meantime, but the heavy gale set in again from the southeast.

Q. Now, then, Captain, when you started the donkey-engine, were you able to operate it without any difficulty? A. Yes, sir.

Q. Had anything happened below decks when the vessel lost her deck-load or during this gale?

A. Well, that I could not tell. I could not get below deck to examine her.

Q. Did you have fresh water to operate your donkey-engine with? [249]

A. No. Apparently when the deck-load went overboard, something forward there caused the connection between the donkey-boiler and the fresh water-tank to break and we lost all the fresh water.

Q. How many fresh water-tanks had you on this vessel? A. I had two.

Q. And where was this tank that you were operating the donkey-engine situated?

A. Underneath the forecastlehead above the main deck. It was connected by a pipe with the donkey-boiler so that I could use it for the purpose of raising steam. This pipe, I found, after we cleared the wreckage, had broken and we were then entirely without this water.

Q. Where was the second water-tank?

A. The second tank was located on the aft part, underneath the main deck, on the aft part of the vessel, and, in shipping the pump, I had a small

(Testimony of Capt. A. W. Swenson.)

pump that I screwed on to the pipe flange in the break of the poop in order to pump this water out, and I found that water to be salt.

Q. You found that—

A. The water in the aft tank.

Q. Evidently filled with salt water?

A. Yes, sir.

Q. So do I understand you were then entirely without fresh water?

A. Entirely without fresh water.

Q. Well now, what was the condition of the forepart, of the galley, the donkey-engine, cabin and storeroom?

A. Well, it was completely gutted of everything. In fact the donkey itself, all the connections were broke and it [250] took quite a while. My mate set to work to repair it which he succeeded in doing, in order to pump her out.

Q. When you say that the cabin, storeroom, donkey, galley and cabin were completely gutted, what do you mean by that? That they had filled with water or that the action of the water—

A. The action of the water. They were full for a space of time, the whole cabin and the forepart of the forecastlehead, that is up half ways, was full of water at one time, before the deck-load went overboard.

Q. Now, what became of the stores in the storeroom, were they injured by reason of the action of the water?

A. Well, they were completely destroyed by the

(Testimony of Capt. A. W. Swenson.)

action of the water, by the continual washing back and forth, and breaking them up, and those that broke, of course the tins, were spoiled, etc.

Q. Well, after you got the donkey-engine to work, did you operate her with salt water?

A. Yes, sir.

Q. What did you do then?

A. Well, I got her nearly pumped out, as I stated before, and was gaining before the next gale came up, but after that came she commenced to fill.

Q. Captain, explain how your deck-load was lashed to the vessel?

A. The deck-load was lashed by three-quarter inch chain lashings, nine on a side. In addition to this there is what we call the hog-lashing to each mast, that is made fast around the mast, and stretched out across the deck cargo even with the rail and comes up and is made [251] fast again to the mast above the deck-load. These are the principal ones that we depend on most. They are usually heavier, of heavier material than the others. I considered that she was lashed as well as she could have been. That is, I do not consider with the weight, that she could have been lashed with anything except exceptionally heavy, would have held that cargo on.

Q. Is this the usual and customary way of lashing cargo? A. Yes, that is the usual way.

Q. Now, was it customary for schooners of the class of the "Nottingham" to carry a deck-load of lumber? A. Yes, sir.

Q. On voyages of this character? A. Yes, sir.

(Testimony of Capt. A. W. Swenson.)

Q. Did she have any heavier deck-load on this voyage than she usually carried?

A. No, I do not think she had any heavier.

Q. Have you made other voyages in the "Nottingham" where she carried a deck-load of about the same character as this?

A. Practically the same each voyage that I made in her.

Q. Now, I understand, Captain, that after you started the donkey-engine, you pumped the ship practically clear of water? A. Yes, sir.

Q. After you got the vessel clear of water, from what quarter did the wind come?

A. From the southeast.

Q. I call your attention to this report, down at the bottom of it.

A. Yes, the wind continued from the northwest.
[252]

Q. On what day was it that you got her pumped out? A. On the 10th, I think.

Q. Then it was after you had her pumped out that—

A. I have not stated that she was entirely pumped out.

Q. No, but nearly so. You got the second gale that you speak of? A. Yes, sir.

Q. On what day was that?

A. It must have been between the 10th—

Q. You state in the report, on the 11th.

A. That is right, on the 11th.

Q. Then is when another gale came, as I under-

(Testimony of Capt. A. W. Swenson.)

stand, from the southeast? A. Yes, sir.

Q. Then what took place?

A. Well, then she filled. Then the sea commenced to run over her, and she filled in about five minutes after the sea and the wind got up.

Q. When the deck-load went, what happened to your hatches?

A. That I could not tell. I could not examine them. I could not go near them to examine them.

Q. For what reason?

A. She was covered with part of the deck-load, and the sea going over them continuously; it was dangerous to go fore and aft.

Q. Well, if the vessel filled within five minutes, how could she have done so, how could the water have got in there and filled her in such a short space of time?

A. Oh, I felt sure that something was wrong, either with the hatches or with the places where the masts of the [253] ship were stepped through the deck.

Q. Did you ascertain afterwards what had happened, so that you could testify as to how she filled?

A. I tried to, but it was almost impossible to say when the accident to these hatches occurred.

Q. Well, what did you find the condition of the hatches were after you examined her, after she reached Astoria, after the disaster?

A. Well, I did not examine the hatches until the deck-load was taken off at Portland.

Q. What did you find the condition of the hatches to be in then?

(Testimony of Capt. A. W. Swenson.)

A. Well, they were—I found they were broken up considerably; that is, some of them were lifted out of position and broken more or less, some of the main hatches, and some of the aft hatches.

Q. What did you find with regard to the place where the masts had been?

A. Well, these places would have taken in water, lots of it, but not sufficient to cause her to fill so quickly as she did.

Q. Well, after she filled this second time on the 11th, after the second gale from the southeast came, what was the force of the wind and the sea at that time? A. About fifty miles an hour.

Q. How was the sea?

A. Rough, very heavy; came up very suddenly and heavy.

Q. Would or would not the waves wash right over the vessel?

A. Oh, the waves were going continually over the vessel, deluged her with water, hundreds of tons of it, washed clear [254] over, waves running clear over.

Q. What did you do with the vessel after she filled this second time?

A. I put the forestaysail on her and put her before the wind. That is the only thing that I could do. I endeavored then to try to steer for Cape Flattery. The wind was from the south; that was my only course, and thinking of being sighted by some steamer that could render assistance.

Q. Were you sighted by any steamer?

(Testimony of Capt. A. W. Swenson.)

A. Sighted two steamers, but they failed to respond to our distress signals.

Q. What distress signals did you use?

A. Well, we burned blue lights. I had quite a number of them on board, and I burned the blue lights for two hours through the rigging one night, for a steamer that apparently lay by us, but as daylight came I saw the steamer disappearing, apparently not noticing us.

Q. What officers did you have on board besides yourself?

A. I had a first and second officer.

Q. What are their names?

A. The first officer's name was William Brown. The second officer's name I cannot recollect; we have so many of them. I do not memorize their names.

Q. This man Brown, did you know him?

A. He had been mate with me then for two years.

Q. Do you know what papers he had?

A. Yes, he had master's papers; I think he had master's papers for sail.

Q. What crew did you have on board?

A. I had a Union crew, what we call a Union crew, shipped [255] by the Coast Seamen's Union, in Portland.

Q. How many men?

A. Seven before the mast; six sailors and what we call the donkeyman.

Q. Who else did you have on board?

A. Cook. Seven sailors, two mates, cook and myself.

(Testimony of Capt. A. W. Swenson.)

Q. Were any representations made to you by the crew or the officers as *sho* what should be done after this second disaster, or at any time?

A. There was nothing, no representations made until the schooner "David Evans" hove in sight on the 13th, I think it was.

Q. What representations were made to you at that time?

A. Well, they wanted to abandon the vessel. They were almost crazy for the want of water.

Q. Now, your fresh water was all destroyed on—

A. On the morning of the 9th.

Q. What day of the month was it that you sighted the "David Evans"?

A. The 13th, I think I stated.

Q. Now, during this time, had both yourself and officers and crew been without water, fresh water?

A. Entirely without *out* it, yes.

Q. What did you have in the nature of food during this time?

A. Well, we had canned food that was not destroyed, that we managed to save. We had canned meats and canned vegetables.

Q. Now, what did you have as a substitute for water during this time?

A. Well, I had some—perhaps it might not be a substitute— [256] I thought it was a substitute, I had some claret wine on board. I did not know how much to give to them of that; I did not give them very much. I gave them a couple of tablespoonsful three or four times a day.

(Testimony of Capt. A. W. Swenson.)

Q. And was that the only thing they had in the nature of liquid?

A. That is the only thing. That is all. I beg pardon, I had a barrel of beer on board, but I did not try to use it.

Q. Where was this beer situated?

A. That was aft somewhere. In fact I did not try to look for it. I did not see it. I do not know whether it was destroyed or not.

Q. So you do not know whether you had this beer at the time.

A. I found, after I got back to Astoria, that it was not there. The beer was gone. I did not use it.

Q. Were you able to do any cooking?

A. No, sir.

Q. From what time were you unable to cook?

A. From the morning of the 9th.

Q. When the "David Evans" came in sight, what, if any, representations were made to you by the crew or your officers?

A. Well, they all came to me and wanted to leave the vessel; that is, without asking questions of me until when the "David Evans" came up, they all got in the forecabin and put all their clothes on and were tied around with bundles, and I remonstrated with them then. I says, "What are you trying to do?" I says, "If you jump overboard with those clothes, you will drown. If you get overboard with your clothes on, you will drown, better take them off." [257] I says, "Furthermore, we are not going to leave this vessel." The second mate he made the

(Testimony of Capt. A. W. Swenson.)

remark to me, he says, "Captain," he says, "If you do not let us leave this vessel with the boat, that is providing the 'David Evans' *came* come here in a boat," he says, "I will simply jump overboard and swim to her," and he says, "You know that we have been without water for four days, and I cannot stand it much longer," and the rest of the crew, they spoke up the same way, and then I told them, "You will have to wait until the wind and weather subside; you could not launch a boat in this kind of weather." Towards noon the wind subsided and made it a little smoother, and the "David Evans" came up just on our port bow and broke all her sails down except the forestaysail. She had practically only the sails that we had on. I began trying to tell the captain of the "David Evans" to go about his business, go into Astoria and report us, but he did not seem to want to understand this, so he came up and hove to right in front of us, and then of course the men renewed their request of me that they certainly ought to leave the vessel. I then took the mate on one side, and I says—

Q. That is mate Brown?

A. Yes, sir. He had been on my side up to this time *for not for* leaving before I took him on one side. He says to me, he says, "I can launch that boat." Then I took him to one side and I says, "Do you mean to say that you want to leave this vessel?" "Why," he says, "Captain, I don't see nothing else to do." He says, "What is there to do? What chance have we got? We have got a chance to save

(Testimony of Capt. A. W. Swenson.)

our lives now," he says, "but," he says, "with a southeast gale coming [258] the only place we can go is for Cape Flattery or the Vancouver shore, should we not succeed in being picked up by a steamer, we would probably land on the rocks on Vancouver shore and all be lost; with wind from the southwest the chances are we would go ashore on the coast of Washington, somewhere between Gray's Harbor and the Columbia River."

Mr. CAMPBELL.—We do not question the judgment in leaving the vessel.

Mr. CLISE.—I understand you do not question the propriety of the captain abandoning the vessel?

Mr. CAMPBELL.—Certainly not. I think we would have all done it.

Q. (Mr. BOGLE,) The "David Evans" could not have towed you, could she? A. No.

Q. (Mr. CLISE.) Then as I understand, you did abandon the vessel under these conditions?

A. Yes, sir.

Q. Was it your opinion that it was the only thing to do under the circumstances?

A. Well, I saw it that we had nothing else to do; we could not do anything else under the circumstances without the vessel being reported by someone, there was only one chance in a hundred that she would be picked up before she got on the beach.

Q. What became of your log-book?

A. The log-book?

Q. Yes.

A. The log-book was entirely destroyed. That

(Testimony of Capt. A. W. Swenson.)

was in the mate's room. The mate's room was gutted. He lost [259] everything he had. I had to give him some of my clothes to go ashore with.

Q. So the log-book was destroyed?

A. The log-book was destroyed.

Q. Then you were taken aboard the "David Evans." What did the "David Evans" do?

A. She set her course for the Columbia River, where she was bound.

Q. Where did she run to?

A. We arrived in Astoria on the 14th, the next day.

Q. What did you do?

A. The first thing I did—before I got ashore I reported the position of the "Nottingham" to a tug, I think it was the "Tatoosh"—no, the "Goliah," Captain Bailey, he was alongside, and as soon as I had a chance with the tug of the "David Evans," when he came alongside, I gave him the position.

Q. What was the name of that tug?

A. The "Wallula."

Q. That was the name of the tug that rescued her?

A. Yes, sir.

Q. Did you make any report to any other?

A. Well, I made an official report, the same as you have there.

Q. To whom did you deliver that?

A. I made several copies of it.

Q. Did you make a report to the marine officers there at Astoria?

A. I made a report to the custom-house, the wreck report.

(Testimony of Capt. A. W. Swenson.)

Q. (Mr. CAMPBELL.) That is called the wreck report at the [260] Custom-house at Astoria?

A. Yes, sir.

Q. (Mr. CLISE.) When did you next see the "Nottingham"?

A. I saw the "Nottingham" on the 15th.

Q. Where was she then?

A. I saw her as she was being towed into Astoria by the tug "Wallula." I think that was the 15th. I stood on the wharf and saw her being towed in.

Q. Was the crew which you had on this voyage the usual crew for schooners of the class of the "Nottingham"? A. Yes, sir.

Q. Just prior to loading at Westport, what was the voyage that you were on?

A. Just had completed a voyage to Australia, a cargo of lumber to Australia and a cargo of coal back to Astoria.

Q. Back to Astoria. A. Yes, sir.

Q. Now, on this voyage were you as deep in the water going to Australia as you were on this voyage leaving Westport? A. Practically the same.

Q. On this voyage did you encounter any heavy weather? A. Yes, at various times.

Q. Did you encounter as heavy weather as these two storms?

A. Yes, continued longer. I would not say that I had a wind as strong at any time as I had for a few minutes when it took the boat away and throwed the vessel over, but I had just as heavy storms that continued longer, several times during that voyage.

(Testimony of Capt. A. W. Swenson.)

Q. During this voyage did the vessel make any water?

A. No, sir, nothing to speak of, not more than this class [261] Vessels usually do, a wooden vessel makes more or less water. There are hardly any of them that are entirely dry.

Q. During the time that you were loading at West port, did she make any unusual water?

A. She did not make any water at all, then.

Q. While the vessel was at Sidney did you have any repairs made on her? A. Yes, sir.

Q. What?

A. I had her drydocked, cleaned and painted, and all her soft places and butts calked. In fact I had her thoroughly examined for all such places all over, and all places where it was found was calked and cemented.

Q. About when was this?

A. Well, I would not be able to tell you the date.

Q. Well, was it April or May, or March?

A. I will have to think. I arrived in—it must have been in April I arrived in Sidney.

Q. 1911?

A. 1911. April or May. May have been May.

Mr. CLISE.—It is agreed that these repairs were made in Sidney in April, 1911.

Mr. CAMPBELL.—Yes.

Q. Now, when the "Nottingham" was towed up the Columbia river from Astoria to St. Johns, were you on her? A. I was.

(Testimony of Capt. A. W. Swenson.)

Q. And was there any water in the vessel at that time?

A. Yes, there was some water, I think there was about three feet of water in her. [262]

Q. Would that render her navigation any more or less difficult?

A. Well, it would have some—it would make it a little more difficult than if she was entirely free, it certainly would in the hands of unskilful pilots, etc., it would make a difference.

Q. Now, Captain, can you give any explanation, other than you have already given, as to how the “Nottingham” made this water?

A. I cannot. I examined that vessel after she had been drydocked. I examined her on the drydock and I examined her after she got off the drydock. I went around her.

Q. (Mr. CAMPBELL.) You mean at Sidney, Australia?

A. No, St. Johns. I slung stays over the side as painters would in painting a house and went all around and examined the seams and butts, etc. With the exception of a very few soft places, I found her good. I found one place aft at the stern post, the wood ends there, about six inches long, where I could put a case knife in alongside the oakum quite freely.

Q. Did you read the testimony of Captain Gibbs in this case? A. No.

Q. You have not seen his testimony?

(Testimony of Capt. A. W. Swenson.)

A. No, sir. I could put a case knife or a table knife in there.

Q. Now, then do you mean that the width of this opening was the thickness of a case knife, or was it wider or less?

A. Well, I don't think you could get more than a case [263] knife in at the time I examined her.

Q. How long was this open?

A. About six inches long.

Q. How far could you put this case knife in?

A. Well, between two and three inches.

Q. Was there any oakum in the seam at that time?

A. Yes, there was some oakum in there.

Q. Now, then, if there had been no oakum in this seam, and you could put your case knife through the width of the plank, what would you then have encountered. In other words, please explain the construction of the stern of the vessel there?

A. Well, a small space like that six inches long, without any opening entirely through, according to the construction of the vessel it should not let any material water in whatsoever, because it is one mass of solid wood there and the planking is fitted outside of this wood and if it is done properly, by proper mechanics, it should be tight without any oakum in that seam at all.

Q. How thick was this solid construction that you speak of?

A. Well, it is various thicknesses. It ought to be at least two feet of solid wood there.

Q. This solid wood, you do not mean one piece, but

(Testimony of Capt. A. W. Swenson.)

built up of a number of pieces?

A. Yes, a number of pieces.

(Recess taken until 1:30 P. M.) [264]

Afternoon Session, 1:30 o'clock.

Present: Mr. CLISE and Mr. BOGLE, for the
Plaintiff.

Mr. CAMPBELL, for the Defendant.

Capt. A. W. SWENSON, on the stand for further
direct examination.

Q. (Mr. CLISE.) I understand you wish to
make same corrections in the answers that you gave
this morning? A. I do.

Q. Just state.

A. In answering about the preliminary survey, I
stated it was handed to me by a Mr. Cherry. I got
a little confused. It was mailed to me by Captain
Crow, and the other one was handed to me, the final
survey was handed to me by Mr. Cherry.

Q. Then you wish to make a correction as to having
read Captain Gibb's testimony?

A. Yes, I did not quite understand the question.

Q. Have you read his testimony? A. I have.

Q. This seam that you were testifying about and
which you said was about six inches long and about
the thickness of a case knife, is that the same seam
that Captain Gibbs was testifying concerning?

A. Well, apparently it seems to be the same thing.

Q. How did you come to make this examination?

A. My attention was called to that by Captain
Crow, and when I was requested by Mr. Thorndyke
to make a thorough examination of the top side

(Testimony of Capt. A. W. Swenson.)

of the vessel. I did make that examination that I have already stated. [265]

Q. When was this examination made by you?

A. The date I cannot call to mind.

Q. Did you make this examination in response to a telegram from Mr. Thorndyke?

A. I did, yes, sir.

Q. I will show you this night-letter and ask you if this is the telegram you received from Mr. Thorndyke asking you to make the examination?

A. Yes, sir, that is the telegram received, a copy of it at least.

Q. After examining that telegram, does that refresh your memory as to the date about when you made the examination?

A. The 21st of December.

Q. Now, this telegram is dated the 21st of December.

A. I made the examination the following day.

Q. Now, Captain, will you explain the construction of the water-closet on the "Nottingham"?

A. Well, the water-closet is placed on the aft part of the vessel, on the main deck; from there it has a lead pipe placed down through the timbers, or through the ceiling and timbers and outside planking and is fastened on the outside to the planking of the vessel.

Q. Is the opening in this pipe on the outside of the vessel above or below the water-line?

A. It is above the load water-line.

Q. Well, is there any covering or substance placed

(Testimony of Capt. A. W. Swenson.)

over this opening on the outside of the vessel?

A. We have a piece of heavy leather clapper nailed half way around on the forepart of the pipe, so that when [266] the vessel goes ahead or falls down in the water, this leather clapper closes over the hole so as to prevent any quantity of water reaching up through this pipe.

Q. So that it lets anything from the inside be discharged?

A. Well, usually when the vessel rises you know, it lets the water down, that opens naturally, tends to open that clapper. Of course it is not made fast, solid; it is like on a hinge.

Q. Would the pressure from the water coming against the side of the vessel open or close that clapper?

A. Well, it would have a tendency to close it.

Q. What is the construction on the side of the vessel there that holds the lead pipe?

A. Well, it is solid timbers generally: I think in the "Nottingham's" timber are ten or twelve inches thick.

Q. Now, if the flange from this lead pipe which is fastened on the outside of the vessel, was cracked, would that permit the ingress of water to any degree through that crack?

A. Well, it is hard to say. If that pipe was constructed properly through the timbers it should not let a whole lot of water come in. On the other hand again, if that pipe is constructed so as to lead between the timbers which it should not, then there is a ques-

(Testimony of Capt. A. W. Swenson.)

tion, there would be quite a little water coming through there.

Q. Now, during the course of this storm, did you have occasion to use this water-closet?

A. Yes, sir.

Q. Did you notice any water coming in through at any time?

A. No. After the accident I could not use it at all, after [267] that because it was full of water.

Q. But there were certain times during the storm when the vessel was taking water, that you could use it? A. Yes, sir.

Q. Captain, referring to the hatches of the vessel, as shown on Plaintiff's Exhibit "L," will you please describe how these hatch covers are made, what is the nature of the construction of the covering that you put over these hatches?

A. Well, they are usually made in sections, with sufficient size to cover the space. In the "Nottingham" I think the main hatch had five sections.

Q. What is the size of the main hatch?

A. The main hatch on the inside is 18 feet. As far as I know there seems to be something wrong with this, but I measured the inside of that and found it 18 feet.

Q. 18 feet long. A. Yes, sir.

Q. How wide? A. Twelve feet.

Q. (Mr. CAMPBELL.) Referring to Plaintiff's Exhibit "L," you say there is something wrong with this?

A. I meant to say this size of the main hatch

(Testimony of Capt. A. W. Swenson.)

seems to be wrong, as far as my measurement is concerned.

Q. Referring to this tracing.

A. I only mean this measurement here.

Q. The 21 feet three inch measurement inside shown on the tracing is wrong, according to your measurement? A. Yes, sir.

Q. (Mr. CLISE.) I understand you say this main hatch on [268] the inside is 18 feet long.

A. Yes, sir.

Q. And how wide? A. Twelve.

Q. Now, is there any cross-beam running up the center of it?

A. There is a piece called the strong back running the length of the hatch, the center.

Q. So these five pieces you speak of, do you mean five pieces on each side or five pieces for the whole hatch? A. Five pieces on each side.

Q. They are all of equal size, are they?

A. Of equal size.

Q. Of what are they constructed?

A. Constructed of common iron wood.

Q. Is there anything placed in the hatch to lift them up for any purpose?

A. Oh, yes, there are ringbolts placed in the corners of the hatch to take hold of to lift them off.

Q. You mean that there were five sections on each side, or ten in all? A. Yes, sir.

Q. When the bids were asked for in January, 1912, for the repair of the "Nottingham," did you give out these specifications and details?

(Testimony of Capt. A. W. Swenson.)

A. I did.

Q. Under whose instructions were you acting?

A. Mr. Thorndyke's.

Q. Were these instructions in writing?

A. I think they were, yes. [269]

Q. I hand you this paper and ask you if that was the written instructions that you received from Mr. Thorndyke at the time you asked for these tenders?

A. Yes, sir.

Mr. CLISE.—I offer these instructions in evidence.

Paper marked Plaintiff's Exhibit "O," filed and returned herewith.

Q. Captain, I show you Defendant's Exhibit 10, which shows the port side of the "Nottingham" looking from the stern forward. Does that show the outlet of the water-closet?

A. It does, where it is marked W.

Q. Where the letter W is placed there?

A. Yes, sir.

Q. Does that show the leather clapper that you refer to? A. It does.

Q. Now, then, that is attached, as you testified, on the forward side? A. On the forward side.

Q. What action would the water have coming against that clapper either from the side or from the— A. Have a tendency to close it.

Q. Did you ever see anyone examine that seam near the stern post? A. Yes, sir.

Q. Who?

(Testimony of Capt. A. W. Swenson.)

A. I saw Mr. Walker and Captain Crow together examine that.

Q. About when was that?

A. That was at the time she was placed on the drydock at St. Johns, that was in December, some-time. [270]

Cross-examination.

Q. (Mr. CAMPBELL.) Where was she at the time of that examination, Captain?

A. Where was the vessel?

Q. Yes.

A. She was on the drydock at St. Johns port of Portland, Oregon.

Q. Lifted out of the water? A. Yes, sir.

Q. You saw Captain Crow and Walker examine it at that time? A. I did.

Q. What did they use to examine it with?

A. Well, they had a knife, we sent up to the galley, the cook's galley, and found an old knife there, a table knife.

Q. Are you sure about that? A. I am sure.

Q. On the drydock? A. Yes, sir.

Q. Was there any staging erected by which they got up there?

A. Yes, we used a long ladder.

Q. You used a long ladder? A. Yes, sir.

Q. How long?

A. Oh, 21 or 22 feet. Sufficiently long to reach there anyway.

Q. At what draft was that open seam?

A. Well, I should judge it was about 22 feet,

(Testimony of Capt. A. W. Swenson.)

twenty-one feet six or twenty-two, something like that. I never measured it. [271]

Q. Was she on the keel blocks at that time?

A. She was.

Q. How high were they from the floor of the dock?

A. About three feet, I think.

Q. And you say a ladder was placed against her stern and these men went up there and examined it?

A. Yes, sir.

Q. Did you? A. I did not go up, no.

Q. Now, you have just been testifying about the water-closet. The only purpose that this clapper would serve would be to keep the sea from rushing back into the inside of the pipe, would it not?

A. Yes, sir.

Q. That is intended as a protection, to keep the water from rushing back into the closet itself, is it not?

A. It is there for that purpose, to keep the water from rushing up into the toilet.

Q. It would in no way protect a crack in the flange, would it?

A. It would for the time being. Of course while it was closed just as much as it would it would keep the water from going up into the closet.

Q. Did it fit tightly over that flange?

A. The pressure of the water would keep it pretty close.

Q. Did it fit tightly over the flange?

A. The clapper?

Q. Yes.

(Testimony of Capt. A. W. Swenson.)

A. I examined it when it was put there. It fit tight.

Q. By fitting tight, you mean it simply rested on it? [272]

A. When it was forced up it fitted tight.

Q. Not water tight, was it?

A. Sufficient pressure it would be water tight.

Q. It was simply a piece of leather that was fastened on the plank of the vessel which hung down virtually perpendicular, didn't it?

A. Well, it did not hang down perpendicular. Of course it was the heaviest kind of leather, pump leather.

Q. It was not intended as water tight valve, was it? A. Oh, no.

Q. Now, this water-closet pipe, as I understand it, came down from the water-closet that was in the cabin? A. Yes, sir.

Q. It lead through the cabin floor?

A. Yes, sir.

Q. And turned and went inside of the—

A. It went almost straight, a little slantwise. Almost straight.

Q. Almost straight to the outside of the vessel?

A. A little angle.

Q. And it passed through the ceiling of the vessel? A. Passed through the ceiling.

Q. It did not pass through any of the frames?

A. That is a point I could not tell, for I have not seen the construction.

Q. You never saw the construction?

(Testimony of Capt. A. W. Swenson.)

A. Not that.

Q. Well, is it usual to have these things pass through the frames?

A. Yes, I think so. [273]

Q. Do they weaken the frames of vessels by passing pipes through them?

A. There should be sufficient frame there to allow it.

Q. Is it customary to pass a thing of that size through the frame?

A. There is additional frame put there for that purpose in a well-constructed vessel.

Q. You have no knowledge whether that was done in this case? A. No, I do not.

Q. And it then passed through the outside plank?

A. Yes.

Q. Now, in your judgment, any water that would get in from the crack in the flange alongside of the pipe, would pass down into the bilge, between the plank and the skin?

A. It would pass between the outside plank and the timbers.

Q. And run down into the bilge? A. Yes, sir.

Q. Now, Captain, going back over your testimony as to the circumstances leading up to the trouble that you got into, I understand you to say that you left Astoria in the tow of a tug? A. Yes.

Q. She took you across the bar? A. Yes, sir.

Q. Was the bar breaking? A. Yes, sir.

Q. What you would call a moderate bar?

A. Yes.

(Testimony of Capt. A. W. Swenson.)

Q. Did she strike on the bar going out? [274]

A. No, sir.

Q. You then stood off-shore on the port tack?

A. Yes, sir.

Q. For two days? A. Two days.

Q. What kind of weather did you have immediately after you left port?

A. Well, the first day it was moderate, light moderate southerly wind.

Q. A very fair wind was it not?

A. It was not a fair wind, it was a dead-ahead wind.

Q. What do you mean by fair, in degree?

A. It was a good sailing breeze.

Q. You found that she began to leak shortly after you left the bar? A. I have so stated.

Q. I want to refresh my recollection about it. How soon after the tug left you did you begin to notice that she was making water?

A. Well, I think it was on the second day that I felt, commenced to feel that she was making more than usual.

Q. It was on the second day that you began to use your pump, was it not?

A. Oh, we used—the steam or hand-pump.

Q. The hand-pump?

A. We started to use the hand-pump almost right away. We always do that when we leave port. The first thing we do is to see if the vessel is making any water.

Q. How often did you pump?

(Testimony of Capt. A. W. Swenson.)

A. Well, the first day we did not pump so—practically pumped [275] about an hour out of four.

Q. The first day?

A. No, the first day we did not pump quite so much as that.

Q. The second day did you begin to pump one out of every four hours? A. Yes, sir.

Q. It was at that time that you found that she was taking more water than usual?

A. Yes, I thought so. I thought she was taking more.

Q. Up to that time you had had the fairest kind of weather, hadn't you?

A. Not the fairest kind of weather. The second day it commenced to blow sufficiently to shorten sail but I did not take in sail before I have to. We have to have quite a breeze before I take in sail.

Q. You did not encounter any weather until after the sixth day that required you to take in any sails, did you?

A. I took in sails after I put her on the starboard tack.

Q. But you did not take in any sails until after you had put her on the starboard tack?

A. No, the wind increased.

Q. When you are able to carry all of your canvas, don't you consider it to be fair sailing weather?

A. I did not carry all my canvas. I only carried my lower sails. I did not carry the gafftopsails.

Q. You did not have any of them reefed?

(Testimony of Capt. A. W. Swenson.)

A. No, not until after I put her on the starboard tack.

Q. You had all of your lower sails set?

A. All the lower sails set. [276]

Q. Do you consider it fair sailing weather when you are able to carry all the lower sails without reefing? A. The weather gets pretty heavy—

Q. Do not you consider it fair sailing weather when you can carry all your lower sails without reefing? A. Yes, sir.

Q. While you were sailing in that way you discovered that the vessel was leaking?

A. Yes, she was leaking a little more water than she had been.

Q. Well, a little more water, so that it attracted your attention, didn't it? A. Yes, sir.

Q. And you proceeded to pump at least one hour out of every four? A. Yes.

Q. Now, on the 6th day of October you put her on the starboard tack?

A. Yes, if that is the day.

Q. And you did that because the wind had shifted more? A. To the west of south.

Q. And you were able to stand down along the coast? A. Yes, sir.

Q. And immediately that you put her on the starboard tack you found that she was making more water in her bilges?

A. I made a correction in that part of it which I omitted. After putting her on the starboard tack the sea was so rough and she gave quite a lurch.

(Testimony of Capt. A. W. Swenson.)

Q. I am not asking about that. My questions are plain, I think. [277]

A. All right, go ahead.

Q. When you put her on the starboard tack, you found that she was making more water in her bilges immediately? A. I did not say immediately, no.

Q. What did you mean by your statement then—you made a statement before the adjusters, did you not? A. Yes, sir.

Q. Your recollection at that time was clear, was it not?

A. Well, fairly clear, but still as I say I omitted—

Q. We will come to that later, I know you testified that way. Your recollection was clear at that time?

A. Fairly clear.

Q. To whom did you give this report to which you were referring this morning for the purpose of refreshing your recollection which is entitled "To whom it may concern"?

A. I made several copies of that.

Q. And signed by yourself?

A. I sent one to Mr. Thorndyke. I think Mr. Cherry in Astoria got one copy of it.

Q. How soon was that made after your return to Astoria?

A. That was made immediately on my arrival.

Q. (Mr. BOGLE.) Who was Mr. Cherry?

A. Well, he claimed to represent the underwriters; in fact he professed to be, as far as I know, agent for the underwriters.

(Testimony of Capt. A. W. Swenson.)

Q. (Mr. CAMPBELL.) Lloyd's agent at Astoria, is he not?

A. I believe he is.

Q. Now, in your statement before the adjusters, you said this: "October 6th when in longitude about 128 west [278] the wind hauled somewhat to the west of south and the vessel was put on the starboard tack. As soon as this was done it was found that she made more water rapidly and in a short time it was impossible for the hand pumps to keep her free." Now, that was almost immediately after you put her on the starboard tack?

A. If you want it stated that way, it may be.

Q. Is that not a fact?

A. We do not take these things in instants. I probably found it out four hours after or something like that. I had been pumping every four hours. When I started to pump again, I found it took longer to pump the amount of water out, so I could not just tell.

Q. According to your present recollection, you discovered the first time you pumped after you put her on the starboard tack, that she was making water very rapidly? A. That is right.

Q. You found it was impossible to handle it with the hand pumps? A. Yes, sir.

Q. Now, at the time when you made up this report from which you refreshed your recollection, you were right fresh from your troubles, were you not?

A. Yes, sir.

Q. You were making that up as a solemn state-

(Testimony of Capt. A. W. Swenson.)

ment of what took place, were you not?

A. Well, I tried to.

Q. You rendered that report to your owners?

A. Yes, sir.

Q. You gave it out publicly as the circumstances attending [279] the disaster? A. Yes, sir.

Q. Well, why was it, Captain, that your recollection now, more than a year after the trouble, is fresher than it was at that time, as to your deck-load shifting when you put her on the starboard tack?

A. Well, I will tell you. Of course, at that time I tried to make things as brief as possible, and I could not think of everything at the time, that is the reason.

Q. Sometime after that, you made this sworn statement before the adjusters, didn't you?

A. Sometime after, yes.

Q. Why was it at that time that you did not recollect your deck-load shifting when you put her upon the starboard tack?

A. Well, I do not know why I could not recollect it.

Q. Have you been discussing this case with your counsel before testifying here?

A. I have discussed it, but that is a part I have not discussed.

Q. You never mentioned that?

A. I told them that that part I had omitted, without them asking me any questions.

Q. When did you first remember that you had omitted that?

(Testimony of Capt. A. W. Swenson.)

A. Well, I could not tell you, but after going over the business, that is over the trouble, over and over again I found that I had omitted things that should have been written.

Q. When did you see this statement that you went over? A. When did I see it? [280]

Q. Yes, when was it that this came to you?

A. I could not tell you, it is a long time ago now.

Q. Did you make any effort to correct the statement that you had made to the adjusters? A. No.

Q. Did you report it to your managing agent, Thorndyke? A. After I came back again.

Q. This time? A. Yes.

Q. He was discussing with you at that time the unseaworthiness or seaworthiness of this vessel, was he not? A. Yes, he has been discussing that.

Q. And at that time you recollected the shifting of the deck-load when you put her upon the star-board tack? A. I recollected it before that time.

Q. How long before that time?

A. Well, probably a year ago, or so.

Q. You did not make a report of that to your principals?

A. No, not at the time. Of course, I have been away to sea ever since.

Q. But you were in port for a considerable period following this disaster? A. Yes, sir.

Q. For nine months, were you not? A. Yes, sir.

Q. During that interval you never made any attempt to correct it?

A. No, it never came to my mind.

(Testimony of Capt. A. W. Swenson.)

Q. Never came to your mind. Now, the first severe gale of wind you encountered was about the 8th of October? [281]

A. Well, we had a gale from the southeast before that. I had occasion to shorten sails.

Q. How much did you shorten them?

A. Double reefed the mainsail and the mizzen.

Q. Now, that weather at that time was not any severer than you would ordinarily encounter or expect to encounter on a voyage on this coast at that season of the year?

A. It was a little early for these kind of gales in October, a little early.

Q. Don't you begin to get southeast gales in October?

A. Yes, they commence sometimes earlier.

Q. You had passed through equally as severe weather as that southeast gale hundred of times before? A. Yes, sir.

Q. So that it was the character of weather you might expect on a voyage off this coast? A. Yes.

Q. When you put her on the starboard tack, you found that your hand-pumps were not able to take care of the water? A. Yes, sir.

Q. Then you tried to work your steam-pump?

A. Yes, sir.

Q. And you found it out of order?

A. Yes, apparently.

Q. It would not work? A. No.

Q. For that reason you could not keep her free of water? A. For that reason.

(Testimony of Capt. A. W. Swenson.)

Q. And she gradually filled on you, is not that the fact? A. Well, now, no, it is not. [282]

Q. Well, we want the facts. What do you mean by saying it is not?

A. We got the steam-pump to work after that. I already have testified to that. And if we had not got that heavy gale from the northwest I have no doubt in the world we would have pumped her out and that accident would not have happened.

Q. But at this time you were not able to free her of water by reason of the steam-pump being out of order? A. That is right.

Q. And by reason of that fact the water kept gaining on you until she was in more or less water-logged condition?

A. Yes, but when that heavy gale struck us, the steam-pump was working then.

Q. We will come to that later on.

Mr. CLISE.—You are not required to answer questions with yes or no. You can answer the questions in such manner as you think best and responsive to the question.

Mr. CAMPBELL.—If my question calls for an answer, yes or no, he can answer and then explain.

Q. Now, what did you continue to do when you found that your steam-pump would not work?

A. Well, we continued to try to find out the reason why it would not work.

Q. You say that you had used this steam-pump in Astoria? A. Yes, sir.

Q. And washed down the ship? A. Yes.

(Testimony of Capt. A. W. Swenson.)

Q. What portion of the ship were you washing down? [283] A. The forepart and aft part.

Q. But the suction that you then used was not the suction that extended into the bilges of this vessel, but an overboard suction?

A. It was not the same.

Q. It was a suction that went overboard?

A. The suction we used for washing down the ship went over the side.

Q. Now, did Captain Crow himself personally look over the vessel while she was at Astoria?

A. No, sir.

Q. Was he aboard of her at all while she was at Astoria?

A. No, sir. Not on the outward voyage.

Q. I speak of the outward voyage. He then made no personal examination? A. No, sir.

Q. Was this steam-pump examined by him at Astoria? Before your vessel went to sea?

A. No, sir.

Q. Was it examined by any other surveyor?

A. I think Mr. Cherry went into the pump-room, yes.

Q. Was Mr. Cherry a surveyor?

A. Well, he claimed to be. He was authorized by Captain Crow to make this survey.

Mr. CAMPBELL.—I move to strike the conclusion of the witness.

Q. Did you work the steam-pump for him?

A. No.

Q. You did not try the steam-pump on the bilges

(Testimony of Capt. A. W. Swenson.)

at all after you left Westport, did you? [284]

A. No, sir. I had no occasion. There was no water in the vessel.

Q. So that the first time that you tried this steam-pump after you put your cargo on to the vessel, was when you got into trouble after you left the river?

A. That was the first time.

Q. How much did this deck-load shift, as you have stated, when you put her on the starboard tack?

A. About four inches.

Q. Four inches. That is the top of it shifted four inches? A. From the rail up.

Q. How high was the top of the deck-load above the rail? A. Nine feet.

Q. So the top of the deck-load, after you put her on the starboard tack and after it shifted at that time, was four inches more *ouboard* that it was when the vessel was loaded? A. That is right.

Q. What permitted it to shift these four inches, the top of it, the lashings?

A. Well, I suppose it would be the lashings.

Q. What kind of lashings did you have on?

A. Chain lashings.

Q. How many of them?

A. Twelve, I think, on each side.

Q. You were not able to say whether or not the lumber underneath the rail had shifted at all, were you? A. No, I was not able to say that.

Q. Now, you testified this morning that early in the morning of the 8th of October, you got your steam-pump to working? [285] A. Yes, sir.

(Testimony of Capt. A. W. Swenson.)

Q. And you started to take the water out of her?

A. Yes, sir.

Q. And then, before you got the water out of her, you were struck with this heavy northwesterly gale?

A. Yes.

Q. And this heavy northwesterly gale did what to her?

A. Threw her on her beam ends and shifted the deck-load more than before.

Q. As soon as she shifted the deck-load more you got ready to jettison? A. Not immediately, no.

Q. Well, how soon after that did you get ready to jettison? A. The following morning, the 9th.

Q. Were you able to use your pump after she shifted the deck-load following the northwest gale?

A. Only for a little while, but not very long.

Q. What did you do in preparation for the jettisoning of the deck-load?

A. Well, I had a big spar on the starboard side 82 feet long. I had to cut that in pieces in order to get that so I could shift it on to the port side. It was while I was sawing this spar to pieces that she listed, filled more and more and listed so heavily that all the deck lashings snapped.

Q. Did you take up the strain on any of your lashings in preparation to let others of them go?

A. No, I had not come to that.

Q. You had not come to that yet. Now, when your deck-load went, it carried with it the spars?

[286] A. Yes.

Q. Where did they break off?

(Testimony of Capt. A. W. Swenson.)

A. They seemed to break off in two places, even with the deck-load, and they broke off apparently just about even with the rail and then down level with the deck.

Q. Did they break in two places at the same time?

A. Must have done so.

Q. Did you notice at that time?

A. No, I did not know before we commenced to examine down below, after the deck-load was all off.

Q. After you were back in port?

A. After we got in port.

Q. So that as you say the masts go by the board at sea, they broke off about even with the top of the deck-load? A. Even with the rail.

Q. And then when she returned to port you found that they had also parted at the deck? A. Yes, sir.

Q. Now, did Captain Crow make a personal survey of the vessel before you started loading at Westport? A. He did.

Q. What did he do to make that survey?

A. Well, he came down to Astoria after I had discharged my coal and he examined her thoroughly all around.

Q. Tell me what he did?

A. He went—they usually use a pricker, something like this (indicating an ice-pick) jabbing into the seams and into the butts.

Q. What seams, the outside seams?

A. The outside seams. [287]

Q. Deck seams?

A. Deck seams, hatch coamings, the runways, and

(Testimony of Capt. A. W. Swenson.)

went down in the hold examined the soundings of her ceiling and keelsons.

Q. Did he go over that portion, did he examine thoroughly? A. Yes, sir, he did.

Q. You were with him at the time? A. I was.

Q. And you would say it was a thorough examination? A. Yes, sir.

Q. Did he find the seams in a sound and tight condition? A. He found them all sound.

Q. Outside seams and deck seams? A. Yes, sir.

Q. Inside seams? A. Yes.

Q. Did he take a boat and go in under her stern and test the seams around her stern post?

A. No, he did not do that.

Q. Did he test this steam-pump to see whether it was in working order?

A. Yes, sir, it was in working order.

Q. On the bilge?

A. Not on the bilge, but over the side.

Q. The outside suction? A. Yes, sir.

Q. Never tested it on the bilge?

A. No, Crow did not. I would like to state that there was not enough water in the vessel for the steam-pump to work while she was in port, for that reason he could not; no [288] use to try it on the bilge.

Q. You did not work it in the bilge on the way across, did you?

A. Oh, yes, I tried her and he tried her lots of times, but there was not at any time sufficient water to use the steam-pump in the bilge.

(Testimony of Capt. A. W. Swenson.)

Q. So that you could not tell anything about it?

A. I had machinists examine the pump several times.

Q. Machinists aboard the vessel?

A. Machinists yes, and found her in good condition. As long as it would pump water over the side I came to the conclusion the pump was in good order.

Q. Where did the suction lead to?

A. Down to the keelson.

Q. Where was the pump located on deck?

A. Steam-pump?

Q. Yes.

A. In the forepart of the vessel underneath the forecastle-head.

Q. Where did the suction lead to, right straight down into the bilge below, underneath the forecastle-head?

A. No, it leads right amidships, right over the keelson.

Q. The suction-pipe of the pump, does that lead right straight down into the bilge from the pump, or does it run beneath the deck and then down?

A. It runs from the pump underneath the deck and then down at right-angles.

Q. And through the center of the keelson into the bilge? A. Yes, sir.

Q. Did you ever examine the lower end of the suction? [289]

A. No, I had no way of doing so, except by taking the pipe out.

Q. Could not you reach the end of the suction by

(Testimony of Capt. A. W. Swenson.)

taking out a piece of her ceiling?

A. Yes, I suppose they could, but it is an expensive piece of work.

Q. That would require the taking out of what sized piece of the ceiling planks?

A. Five inches thick.

Q. That would mean the taking out of one plank five inches thick? A. Yes, sir.

Q. And putting it back in place? A. Yes, sir.

Q. All it would mean would be the taking out of that plank?

A. No, it would mean the docking of the vessel, and that plank would have to be refastened from the outside, the trunnels.

Q. In order to examine the bottom of this suction-pipe was your vessel so constructed that you would have to put her on a dry-dock and take the outside planking off her?

A. Not the outside plank, but the inside ceiling is so fastened. It is not fastened with spikes, it is fastened with trunnels on the outside.

Q. Then this vessel was equipped in such a way that it was impossible for you to examine the lower end of your big suction-pipe without docking the vessel?

A. Well, practically that, but that pipe could be unscrewed and taken out.

Q. You did not examine that by unscrewing it to see the [290] condition of the lower end of the suction?

A. I did not, because it had been in order most of

(Testimony of Capt. A. W. Swenson.)

the time. There was no occasion for me to do it.

Q. You say on the voyage coming from Australia that you did not have enough water in the vessel to necessitate its use?

A. That is true. I am just trying to recollect when I did use it. I had enough water in her once in Callao, where I used it.

Q. How many voyages previous?

A. The voyage previous to this.

Q. Where did you go from Callao?

A. To Astoria.

Q. Loaded lumber from there?

A. To Australia.

Q. And went back to Astoria? The voyage outward and back to Astoria? A. Yes, sir.

Q. The last time you had occasion to use the pump, tried it so as to ascertain whether the suction was in working order was at Callao?

A. Yes, sir, and it was in good condition at that time.

Mr. CAMPBELL.—I would like to offer in evidence the report of the loss, to which he has been referring during this morning. If you desire the original copy back the commissioner can make a copy of it and return the original.

Mr. CLISE.—I have no objection with that understanding.

Paper marked Defendant's Exhibit 14, filed and returned herewith.

Q. Do you remember how many feet of lumber you had on deck? [291]

(Testimony of Capt. A. W. Swenson.)

A. I do not. The report will show, the final survey.

Q. 667,991 feet in the hold and 588,424 on deck?

A. Probably that is right.

Q. Was that freshly sawed lumber?

A. Yes, sir.

Q. You loaded it right from the saw?

A. Yes, sir.

Q. Have you any record of her draft at that time?

A. When she was loaded?

Q. Yes. A. The record is right there.

Q. Have you any personal record? A. No.

Q. How much would she lose by going from fresh water into salt?

A. Well, I allow about four inches on the "Nottingham."

Q. Do you remember what quantity of lumber you had on deck on your last voyage out?

A. About the same amount, I think.

Q. Where did you load that? A. At Astoria.

Q. At the Hammond mill? A. Yes, sir.

Q. Was that freshly sawed lumber?

A. Yes, sir, it is, most of the time it is fresh.

Q. Practically all the time you load freshly sawed lumber? A. Yes, sir.

Q. Do you remember what your drafts were on this last voyage?

A. Well, practically the same draft.

Q. You have not the figures with you? [292]

A. No, I have not. Of course, the log-book was lost.

(Testimony of Capt. A. W. Swenson.)

Q. You say you received this telegram on December 21, 1911:

“Seattle, Wn., Dec. 21, 1911.

Captain A. W. Swenson, Schr. ‘Wm. Nottingham,’
Care Brown and McCabe, Portland, Or.

Walker disagrees with Captain Crowe views about leak, he thinks top sides responsible. Wants you to make thorough examination of stop sides look especially for rooms make no mention of what you learn over there. Please make examination Friday. Bring equipment list with you.

GLOBE NAVIGATION CO.”

You received that telegram? A. Yes, sir.

Q. How soon was that after she had been docked?

A. She had not been docked then, had she? I have forgotten.

Q. She was docked about that time, was she not?

A. That was before she was docked—I am not sure on that point.

Q. Now, what did you say this morning about the examination you made in response to this telegram?

A. I said that I examined the vessel thoroughly all over. I swung stages on both sides complete and went right around the vessel, me and my mate, and examined the seams the whole top side, the butts and the seams; especially so around the stern post.

Q. And at the stern post you found this open seam?

A. Yes, I found that open seam, about six inches long, I think.

Q. That was the only seam that you found that

(Testimony of Capt. A. W. Swenson.)

was in a leaky condition? A. Yes, sir, practically.

Q. A few butt ends along the side?

A. There were a few soft spots but nothing that I thought—

Q. Was serious? [293] A. No.

Q. Where were these soft spots, along the channel plates?

A. No, not along the channel plates. Most of these were under the counter, those on the aft part of the vessel where, you know, it flanges out.

Q. Looking at exhibit 9, were these places above where you see the ruler? A. No.

Q. Can you show by reference to exhibit 3?

A. Yes, they were under here, along about the turn of the bilge.

Q. That is on the turn of the bilge just abaft the spanker chain-plates, which are marked 2, C, M, on photograph 3? A. Yes.

Q. Was she at that time about as you see her in this photograph? A. Just about.

Q. How did you get underneath her stern so as to examine the seams around the stern post?

A. Well, I slung staging there.

Q. Could you not reach it with a boat?

A. Too high up for a boat.

Q. Her lumber was off her at that time?

A. Yes, sir.

Q. She was then high out of the water?

A. Yes, sir.

Q. How far was this seam near the stern post in under the extreme stern of the vessel?

(Testimony of Capt. A. W. Swenson.)

A. Well, I could not tell you; I never measured her stern.

Q. Ten or twelve feet? [294]

A. I guess it is.

Q. How did you get that staging in there so as to make a close examination?

A. That is easy enough. I had guy ropes on it.

Q. So you gave her at that time a thorough examination? A. Yes.

Q. As to all her butts and seams? A. Yes, sir.

Q. And you found this seam along the stern post as you have described it? A. I did.

Q. And the only other seams on the vessel that you found were a few soft spots in under the counter or turn of the bilge as you have pointed out on exhibit 3, the photograph? A. Yes, sir.

Q. Other than the conditions of the seams that you found in these two places, you found the others in good condition? A. Fairly good condition.

Q. In as good condition as when you went to sea?

A. Yes, practically.

Q. You could not see any difference? A. No.

Q. When that vessel was on the starboard tack, the port side of the vessel would be lower in the water than when she was on the port tack? A. Yes, sir.

Q. What do you mean by "quick work"? You referred this morning to the quick work. Is that the side of the fore-castle-head above the main deck and the side of the [295] cabin above the main deck?

A. Yes, sir, that is part of the side of the vessel

(Testimony of Capt. A. W. Swenson.)

above the main deck, protecting the cabin on the outside.

Q. After you put her on the starboard tack, you said that you found water coming into what you called the half deck space? A. Yes, sir.

Q. Just what is that space?

A. It is a space what we call the poop-deck that runs along more aft to a certain distance forward of the cabin and it drops down about three feet and then the break of the poop extends a little further and then it drops down a partition, down to the main deck. This space is called the half deck underneath that break of the poop.

Q. What do you call the top of that, you walk across that? A. That is the break of the poop.

Q. After you put her on the starboard tack you say you found that there was water coming into that half deck? A. Yes, sir.

Q. How at that time did the water get into the lower hold of the vessel, from the half-deck?

A. Well, I cannot explain that except that the pressure had been so great that it had started this part of the quick work away from the fastenings where it was fastened on the main deck.

Q. That is the only way you can explain it, that is a possible pulling of the quick work away from the covering board? A. Yes, sir.

Q. And allowing the water to get down between the outside plank and the ceiling? [296]

A. Yes, sir.

No. 2631

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

APOSTLES ON APPEAL

(In two volumes)

FIREMAN'S FUND INSURANCE COMPANY
(a corporation),

Appellant,

vs.

THE GLOBE NAVIGATION COMPANY
(a corporation), and S. P. WESTON, as
trustee in bankruptcy of the GLOBE NAVIGATION
COMPANY (a corporation), bankrupt,

Appellees.

BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Appellant.

Filed this.....day of September, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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COMPANY (a corporation), bankrupt,

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BRIEF FOR APPELLANT.

Statement of Facts.

This action is based upon a claim for a constructive total loss under two policies of marine insurance covering the Schr. "Wm. Nottingham". Liability is denied upon two grounds:

(1) That the policies were voided by the unseaworthiness of the insured vessel; and

(2) That a constructive total loss of the insured vessel did not exist under the terms of the policies, because the cost of repairing the damages did not amount to the sum required by the conditions of the policies to give the assured the right to abandon as for a constructive total loss.

The Fireman's Fund Insurance Company, appellant, on April 17, 1911, issued two policies of marine insurance, one for \$6000, and the other for \$24,000, wherein and whereby it insured The Globe Navigation Company appellee, in the aforesaid amounts, against perils of the seas, upon its interest as owner in the schooner "Wm. Nottingham", valued at \$45,000, for the period of one year from the 20th day of April, 1911, to the 20th day of April, 1912.

Thereafter, on the 2nd day of October, 1911, said schooner departed out of the Columbia River, with a full cargo of lumber, on a voyage for Callao, Peru, her port of destination. Shortly after she set sail, on the first day out, and while standing offshore on the port tack, the master ordered the mate to sound the pumps, and the latter thereupon found 15 inches of water in the vessel. Four hours later, the pumps were again sounded, and the water was found to have increased. The water continued thereafter to increase, until, after two days out, it required one hour of pumping out of every four, to keep the vessel free of water. By that time the "Nottingham" was well offshore, and she was

then put about upon the starboard tack, whereupon she immediately commenced to make water freely. The master thereupon ordered the steam pump started, but something was wrong with the pump so that it could not be used. By that time, the "Nottingham" was half filled with water. Eventually, the steam pump was restored to working order, but before the vessel was freed of water she was struck by a northwest gale, and lay over so far that the steam pump could not be used, and she continued to fill. Early on the 9th, she was in such condition that the master concluded to jettison the cargo, but before it could be done, the deck lashings parted and the deck-load went overboard, carrying with it the main, mizzen and spanker masts. The wreckage was cleared away, and attempts again made to pump the vessel out. Before it was accomplished, however, a second gale sprung up on the 11th, and she again filled in a very short time. On the 13th the crew was taken off by the schooner "David Evans", the "Nottingham" then being out of fresh water, and were carried into the port of Astoria, Oregon, whence the "Nottingham" had started, arriving there on Saturday, the 14th.

On the way in, one of the Columbia River tugs was notified of the approximate position of the "Nottingham", and on the next day, the 15th, the tug "Wallula" brought her into the port of Astoria in her dismasted and water-logged condition.

Thereafter, on Monday, October 16th, the manager of appellee, G. F. Thorndyke, served a written notice of abandonment of appellee's interest in said vessel,

as for a constructive total loss, upon Frank G. Taylor, appellant's agent at Seattle, Washington. The abandonment was immediately declined by appellant.

Subsequently, the vessel was libeled by the salvors for \$34,000 salvage, and before she was released from her seizure by the United States Marshal, appellee, by consent, caused said vessel to be towed up the Columbia River to the port of Portland, Oregon, on November 29th, where her cargo was discharged, and she was drydocked, and her damages were surveyed for the purpose of determining whether or not she was a constructive total loss under the policies, by ascertaining the repairs needed to restore her to her former condition, and the cost thereof. Specifications for repairs required were prepared, and thereafter bids for the same, in accordance with said specifications, were called for by appellee. The lowest bidder was William Cornfoot, doing business at Portland Oregon, under the style of Albina Engine & Machine Works, who offered to do the required work and to furnish the materials, for the sum of \$20,950. The contract for repairs was not let to Mr. Cornfoot, and the vessel was not repaired at that time.

On January 19, 1912, appellee advised the charterer of the vessel, W. R. Grace & Co., that the voyage was abandoned, and tendered the cargo to the latter. The claims for salvage were settled for \$3,000.

Demand was made upon appellant for the payment of a total loss under said policies, on the ground that a constructive total loss existed. Compliance with said

demand was refused, and liability for a total loss was denied by appellant. Thereafter, on May 13, 1912, a libel was filed herein, in which recovery of the sum of \$30,000, insured by said policies, was sought upon the ground that a constructive total loss existed under said policies, for which a notice of abandonment had been given. Issue was joined, denial being made of the existence of a constructive total loss. An order of reference was then entered, and proof taken thereunder, and subsequently, on March 10, 1914, an amended libel was filed in which an alleged verbal abandonment as for constructive total loss was set up by appellee, as having been made on October 14th. Issue was again joined by answer, denying said alleged constructive total loss, and particularly said newly alleged verbal abandonment. It was affirmatively alleged that when said vessel started upon said voyage, she was unseaworthy in that she was leaky, and that her pumps were not in working order so that the same could be used to keep her free from the water which entered her hull through said leaky condition, and that by reason thereof, said vessel continued to leak and became waterlogged in fair weather, immediately after starting upon said voyage, and that all of the losses and damages suffered upon said voyage were caused and occasioned by such unseaworthiness (all in accordance with the evidence which had been adduced from the master of said vessel after the filing of the original answer).

The policies were of the usual San Francisco hull time form, but did not cover a partial loss, and only insured against an actual and a constructive total loss. By

a clause upon the face of the policies, it was expressly provided:

“It is also agreed that the insured shall not have the right to abandon the vessel unless the amount which this Company would be liable to pay under an adjustment, as of partial loss for labor and materials, (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured * * * ” (clause 9).

The policies also contained provisions by which could be ascertained, as thus required, the amount which the company (appellant) would be liable to pay under an adjustment, as of partial loss for labor and materials; and the evidence clearly showed that if the cost of repairing the damage to the “Nottingham” should be adjusted as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds), the amount which appellant would be liable to pay under such an adjustment, would fall far below half the amount insured by the policies. It was, and is, therefore, appellant’s contention that, for the foregoing reasons, a right to abandon as for a constructive total loss did not exist.

The policies had endorsed upon their margins, the following provision:

“This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths ($\frac{3}{4}$) running down clause.”

It was the contention of appellee that the aforesaid marginal clause superseded the clauses in the bodies of the policies, and, first, that the right to abandon was to

be determined by the general law and not by the policy conditions (clauses 8 and 9), and, second, that, in any event, by reason of said marginal clauses, salvage and general average charges were to be added, not excluded as provided by clause 9, to the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials, for the purpose of determining whether a constructive total loss existed.

On the other hand, it was the contention of appellant that the marginal clauses did not override the clauses in the bodies of the policies, because they could be construed consistently together, and that the test of the right to abandon as for a constructive total loss remained as provided by clauses 8 and 9, and the rules of adjustment on the backs of the policies. And even on the theory that the general average and salvage charges were to be added to the amount which appellant would be liable to pay under an adjustment as of partial loss for labor and materials, still, taking the bid of the Albina Engine and Machine Works as the cost of repairing the damage to the "Nottingham", the total did not equal one-half the amount insured by the policies, and that, therefore, the right to abandon, as for a constructive total loss, did not exist.

Appellee questioned the right to use the Albina Engine and Machine Works' bid as determining the cost of repairs, and insisted upon other bids and figures offered in evidence by it, the total of which, on its theory, was sufficient to make a constructive total loss.

The case came on for argument before the Honorable Jeremiah Neterer, District Judge, on the proof taken

on the reference, and, on April 14, 1915, the court rendered its decision holding appellant liable for a constructive total loss under the policies. A decree was thereafter entered for \$30,000, and interest, making a total of \$33,419.27, less \$8,500, or a decreed amount of \$24,919.27. The deduction of \$8,500 was made on an agreement of the parties.

This appeal is prosecuted from the decree.

Specifications of Error.

Errors have been assigned, in the Apostles on Appeal, to the decree of the District Court. They will be considered under the following specifications:

I.

That the District Court erred in not holding that the insured vessel was unseaworthy at the commencement of the voyage, and that the loss was caused, and said policies voided, by such unseaworthiness (Assignments of Errors I to XIX, XLIX).

II.

That the District Court erred in holding that the insured vessel was seaworthy at the commencement of her voyage (Assignments of Errors I to XIX, XLIX).

III.

That the District Court erred in not holding that the right to abandon as for a constructive total loss did not

exist under said policies (Assignments of Errors I to V, XIX to LXXI).

IV.

That the District Court erred in holding that a right to abandon as for a constructive total loss existed under said policies (Assignments of Errors I to V, XIX to LXXI).

V.

That the District Court erred in not holding that a constructive total loss did not exist under the policies (Assignments of Errors I to V, XIX to LXXI).

VI.

That the District Court erred in holding that a constructive total loss existed under said policies (Assignments of Errors I to V, XIX to LXXI).

VII.

That the District Court erred in not holding that, if a constructive total loss existed under said policies, the sum of \$3,758.31, general average charges paid by appellant, should be credited upon the total amount covered by said policies, and in not crediting said sum upon the amount decreed to be due under said policies (Assignments of Errors LXXII and LXXIII).

The Argument.

I.

THE INSURED VESSEL WAS UNSEAWORTHY AT THE COMMENCEMENT OF HER VOYAGE, AND THE POLICIES WERE THEREBY VOIDED (Specifications of Error I and II).

THE "NOTTINGHAM" WAS UNSEAWORTHY.

The Fireman's Fund Insurance Company, appellant, on April 17, 1911, issued two policies of marine insurance, one for \$6,000 and the other for \$24,000, wherein and whereby it insured The Globe Navigation Company, appellee, in the aforesaid amounts, against perils of the seas, upon its interest as owner in the schooner "Wm. Nottingham," valued at \$45,000, for the period of one year from the 20th day of April, 1911, to the 20th day of April, 1912.

The "Nottingham," loaded with a cargo of lumber, and bound for the port of Callao, Peru, sailed from Astoria, Oregon, on the 2nd day of October, 1912. Shortly after she set sail, on the first day, and while standing off shore on the port tack, the master ordered the mate to sound the pumps, and the latter thereupon found 15 inches of water in the vessel (Ap. 261). Four hours afterwards, the pumps were tried again, and a longer time than usual was required to pump the water out (Ap. 261). The vessel continued to make water until, after about two days, it took the crew about one hour out of every four before they could get the vessel free from water (Ap. 261-2, 300-1). As the vessel was well offshore by that time, the master put her about upon the starboard tack, whereupon *she immediately commenced to make water very freely* (Ap. 262, 300-4). The

master then ordered the mate to start the steam pump, but something was wrong with the pump and it could not be used (Ap. 265-268, 306-7). *By this time the "Nottingham" was half filled with water* (Ap. 268). Eventually, the steam pump was restored to working order,—just when is uncertain, but about the 8th (Ap. 269, 309-10), for on that date the wind shifted to the northwest, and came on to blow hard (Ap. 268). At the time the gale from the northwest struck the vessel she had not been freed of the water; if she had been, the accident, in the master's judgment, would not have happened (Ap. 310). As it was, she lay over from the wind so that the steam pump could not be used, and so she continued to fill (Ap. 270). Early on the morning of the 9th, conditions were such that the master concluded to jettison the cargo, but before he was able to accomplish it, the deck lashings parted, and the deckload slipped overboard, carrying with it the main, mizzen, and spanker masts (Ap. 270-272). The wreckage was cleared away, and, the wind moderating, an attempt to pump her out was again made (Ap. 272-3). It was nearly accomplished when, on the 11th, a second gale came out of the southeast, and she filled again in five minutes (Ap. 276-7). On the 13th, the crew was taken off by the Schr. "David Evans", the "Nottingham" being at the time out of fresh water (Ap. 280-3).

Presumption of Unseaworthiness.

Up to the gale of the 8th, the weather was the usual weather to be reasonably anticipated (Ap. 300-1). In fact, the master testified that he had passed through as severe weather as the southeast gale hundreds of

times (Ap. 306). In such weather, the "*Nottingham*" sprang a leak so badly that pumping with the hand pumps one hour out of every four could not free her of water, and, when she was put on the starboard tack, still in ordinary weather, the hand pumps could not keep her free at all. Then it was that the steam pump was tried and would not work. Under these admitted facts, we submit that a presumption of unseaworthiness arises.

The Southwark, 191 U. S. 1; 48 L. ed. 65;

The Aggi, 93 Fed. 491; 107 Fed. 300;

Pacific Coast S. S. Co. v. Bancroft & Whitney,
94 Fed. 180, 196;

Carolina Cement Co. v. Anderson, 186 Fed. 145;

Steamship Wellesley Co. v. Hooper & Co., 185
Fed. 733 (C. C. A. 9th Circuit);

Benner Line v. Pendleton, 217 Fed. 497.

The steam pump was out of order when the "*Nottingham*" commenced her voyage, for it did not work when first tried on October 6th, four days after the vessel left port. Nothing had happened in the time elapsing between the commencement of the voyage and October 6th to injure the pump. In the absence of some causes occurring in the interim to which the failure of the pump to work could be attributed, the presumption conclusively arises that the pump was in the same unsound condition at the commencement of the voyage as when tried on the 6th.

Benner Line v. Pendleton, supra.

The master stated that the steam pump was used at Astoria for washing down the vessel before she

sailed (Ap. 307-8), but it conclusively appeared that the suction to the bilges was not then used or even tested (Ap. 308-313). The first time the steam pump was used on the bilges was when it was needed to keep the vessel from water-logging (Ap. 309). The last time prior to this voyage when the steam pump had been used on the bilges, was while the "Nottingham" was at Callao, Peru, the second voyage before. In the meantime, she had been from Callao to Astoria, and from Astoria to Australia, and back (Ap. 315) and the steam pump had not been tested, so far as the bilge suction was concerned during all of that time (Ap. 315).

It was stated that Captain Crowe surveyed and passed the vessel before she left port on this voyage, but it appears that Captain Crowe did not see her after she was loaded (Ap. 308). She was looked over by a Mr. Cherry, Lloyd's agent (Ap. 308), but Mr. Cherry was not an agent in any respect of the Fireman's Fund Insurance Company (Ap. 494).

It appears that the "Nottingham" took the mud on her way from Westport to Astoria (Ap. 260), but there is no evidence of any damage done which would account for the leakage (Ap. 317-9, 355-6). On the contrary, it is established by the testimony of C. M. Nelson, a Portland shipbuilder, who was employed by the Port of Portland to examine the "Nottingham" while she was on the St. John drydock, that she sustained no damage from the stranding (Ap. 443-4, 441). Nor did the stranding have any possible connection with the defective condition of the steam pump.

Without any evidence whatsoever by which the leaking and the condition of the ship's most important pump, can be attributed to any cause which arose subsequent to the commencement of the voyage, we submit that the "Nottingham" falls fairly and squarely within the presumption of unseaworthiness as raised so unequivocally in the cases cited. How can you distinguish the "Nottingham", leaking immediately after leaving port in the fairest kind of sailing weather (Ap. 299-301), with the leak increasing in similar weather until she was nearly water-logged, from the barge in *The Arctic*, supra? We cannot. How can the condition of the steam pump, which had not been tried on the bilge for many months, be distinguished from that of the pump in *Benner Line v. Pendleton*, supra? We do not know.

What more appropriate words could be found descriptive of the "Nottingham's" condition than the following by the court in that case:

"The court below thought the inference was irresistible that the *pumps which failed were not fit to use* when the ship began its voyage. That inference seems justified, and, if justified, *the conclusion is unavoidable that the ship was not seaworthy in this respect also, when she started on the voyage.*" (Italics ours.)

In those two cases last referred to the presumption of unseaworthiness was conclusively raised. There are no reasons, then, for its not being raised on the same grounds against the "Nottingham".

Unseaworthy in Fact.

On the contrary, it appears that when the "Nottingham" was drydocked at St. Johns, a crack was discovered in the flange to the water closet soil pipe, and that a seam without oakum was found at the hood ends on the stern post (Ap. 392, 400, 407-416, 423-426, 441, 352-7, 294-8, 312, 317). The crack in the flange and the seam without oakum, were both on the port side which was the low side when the vessel was upon the starboard tack (Ap. 319), thus accounting for the increase of water which made its appearance immediately after the "Nottingham" was put upon that tack (Ap. 262). There was in this, the only explanation of the source of leakage, an accounting therefor directly attributable to an actual unseaworthiness of the vessel.

THE POLICIES WERE VOIDED BY UNSEAWORTHINESS.

The "Nottingham" being unseaworthy, the policies were voided.

Whatever may be the general law, the California Civil Code and the Washington Insurance Code provide as follows:

Cal. sec. 2681. "In every marine insurance upon a ship or freight, or freightage, or upon anything which is the subject of marine insurance, a warranty is implied that the ship is seaworthy." (Wash., sec. 127.)

Cal. sec. 2682. "A ship is seaworthy, when reasonably fit to perform the services, and to encounter the ordinary perils of the voyage, contemplated by the parties to the policy." (Wash., sec. 128.)

Cal. sec. 2683. "An implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk, except in the following cases:

1. When the insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time; and,

2. When the insurance is upon the cargo, which, by the terms of the policy, or the description of the voyage, or the established custom of the trade, is to be transshipped at an intermediate port, the implied warranty is not complied with, unless each vessel upon which the cargo is shipped or transshipped, be seaworthy at the commencement of its particular voyage." (Wash., sec. 129.)

Cal. sec. 2684. "A warranty of seaworthiness extends not only to the condition of the structure of the ship itself, but requires that it be properly laden, and provided with a competent master, a sufficient number of competent officers and seamen, and the requisite appurtenances and equipments, such as ballast, cables, and anchors, cordage and sails, food, water, fuel, and lights, and other necessary or proper stores and implements for the voyage." (Wash. sec. 130.)

It was held by the District Court for the Northern District of California in a suit upon a marine insurance policy to recover for the loss of a vessel which had been blown ashore, that her failure to have suitable anchors, chains and hawsers constituted a breach of the implied warranty of seaworthiness in section 2683, and that such breach voided the policy.

Pope et al. v. Swiss. L., 4 Fed. 153.

That a breach of warranty voids a policy, has recently been held by this court in

Canton Ins. Office, Ltd. v. Independent Trans. Co., 217 Fed. 216.

District Court's Rulings Erroneous.

The District Court took the position that the contention that the vessel was unseaworthy and, therefore, the implied warranty was violated, and the policy voided, was not well founded. Its ruling was largely based upon a clause in the policy, which, we submit, has nothing whatsoever to do with the question of the seaworthiness of the vessel for the voyage on which this loss occurred. The court referred to clause 5 on the face of the policy, and said that it might be construed as a stipulation with relation to the seaworthiness of the vessel, since it provided for a certificate of fitness.

Clause 5 stipulates:

“Not to load more than net registered tonnage with guano, salt, iron, stone, ore or lime. Not to carry bituminous coal in bulk, except between ports in the Pacific Ocean. Not to carry grain in bulk, nor to proceed to sea, grain laden, except coastwise, without a certificate from an inspector appointed by Underwriters upon the hull or cargo, stating that the vessel is properly laden and fitted for her intended voyage.”

The clause makes no requirements whatever as to the vessel when lumber laden, and cannot be construed as a stipulation with relation to the seaworthiness of the “Nottingham” when loaded with lumber. Simply because the policy provided for the issuance of a cer-

tificate when the vessel was laden with certain cargoes, can by no possible construction be strained into a provision that the implied warranty of seaworthiness was thereby superseded when the vessel was loaded with other cargo, and yet this is the foundation of the District Court's holding.

The District Court also found that the testimony was fairly conclusive that the vessel was seaworthy. The court below heard none of the evidence, it all being taken on a reference. Its finding of fact, therefore, is not conclusive, for the hearing in this court is a trial *de novo*.

We submit that in view of the fact that the vessel sprung a leak in fairest weather, immediately after leaving port, there are no grounds upon which the court could find that the vessel was, in fact, seaworthy. It is true that she had just returned from a long voyage; that she was laden, and prior to departure for sea was inspected and a certificate of seaworthiness issued, but such certificate of seaworthiness was not issued by any agent or representative of appellant, following an examination made after the vessel had been loaded. It is true that one E. M. Cherry, Lloyd's agent, but not a surveyor, and not an agent of appellant, looked the vessel over while she was at Astoria. His certificate is in no respect binding upon appellant.

After referring to the certificate, the court's opinion proceeds to state that after entering upon the body of the ocean, she (the "Nottingham") encountered a heavy storm which tore away one of the lifeboats

and flooded the donkey room; that on the morning of the 9th of October, the deck lashings parted and released the deckload, which went overboard, and carried with it the main mast, mizzen mast, and spanker mast.

The opinion then continues in a brief resume of the incidents from that time on. The error of the District Court lies in its ignoring and passing over the fact, as we have previously pointed out, that, prior to encountering any storm which tore away one of the lifeboats or flooded the donkey room, the vessel had become practically waterlogged. The loss of the deckload and the dismasting of the vessel on the 9th, which was the first time she struck heavy weather, was after she had made so much water that it required one hour out of every four to free her, and after she had been put upon the starboard tack, when the leakage so greatly increased that the master attempted to make use of the steam pump, but found it out of order. *By the time the attempt was made to start the steam pump, the "Nottingham" was half filled with water* (Ap. 268). It is true that the steam pump was restored to working order about the 8th, but the gale of the 9th struck her before they had succeeded in freeing her of water.

In these circumstances, we respectfully submit that the District Court erred in ignoring the condition in which the ship was prior to encountering the storm of the 9th, and in overlooking the fact that even that gale was no severer than to be expected at that season of the year. The decision overlooks the fact that the dismasting of the ship was unquestionably caused by the

condition in which she had been placed by the leakage, and the inability of the master and crew to free her of the water through the deficient condition of the ship's steam pump. *On what grounds can the disregard of such facts be justified?* They were in the case by the admission of appellee's master, and were deserving of credence by the court. If due consideration be given them, then, we most respectfully submit, the court must hold that the vessel was unseaworthy at the inception of her voyage.

Unseaworthiness Pleaded.

The District Court also held that appellant, in contributing to the general average, and in its answer, admitted liability, and did not, at any time, contend for unseaworthiness until after the testimony was submitted in the case and an amended answer filed. It is true that appellant did not plead unseaworthiness in its original answer, but it did not do so because at that time it did not possess the facts of unseaworthiness. Appellee had not laid before appellant the facts which were brought out on the master's examination, but when proof was made, it became clearly apparent to appellee, in the course of the examination of Capt. Gibbs, *that the evidence which was developing, was showing an unseaworthiness on the part of the vessel.* This led to an inquiry by counsel as to whether or not the offer in evidence of a certain photograph (defendant's Exhibit 9), was with a view to establishing the claim that the "Nottingham" was unseaworthy. Thereupon, appellee was notified that appellant did not know whether it would make that claim or not, and that it depended upon

how the testimony developed; that the evidence which had recently come into the hands of appellant (through the master's testimony) made it very likely that appellant would take that position because it was then believed that facts to support the charge of unseaworthiness would be adduced from the master of the vessel from statements, which he had made during the examination pointing to that condition. Notice was thereupon given that if the testimony adduced in the case developed unseaworthiness of the vessel on sailing, the pleadings would be amended to conform to the proof (Ap. 394-5).

Accordingly, after proof was taken, an amended answer was filed to the amended complaint, and in it the unseaworthiness of the vessel, in conformity with the proof adduced, was pleaded.

In these circumstances, we respectfully submit that the District Court erred in holding that appellant had waived its right to question the seaworthiness of the "Nottingham," and that error was committed in not holding that the "Nottingham" was unseaworthy at the commencement of her voyage, and that the policies were thereby voided.

II.

**THE COST OF RESTORING THE "WM. NOTTINGHAM"
TO HER FORMER CONDITION DID NOT AMOUNT
TO A SUM SUFFICIENT TO MAKE A CONSTRUCTIVE
TOTAL LOSS UNDER THE POLICIES.**

THE TERMS AND CONDITIONS OF THE POLICIES.

The Fireman's Fund Insurance Company, appellant, issued two policies of marine insurance, one for \$6,000

and the other for \$24,000, wherein and whereby it insured The Globe Navigation Company, appellee, in the aforesaid amounts, against perils of the seas, upon its interest as owner in the schooner "Wm. Nottingham", valued at \$45,000, for the period of one year from the 20th day of April, 1911, to the 20th day of April, 1912.

Policies Did Not Cover Partial Loss.

The policies insured appellee against actual total loss, constructive total loss, general average, salvage charges and claims under the three-fourths running down clause. *They did not insure appellee against partial loss.* Such insurance could have been procured for an increased rate (Ap. 491).

Inasmuch as the "Nottingham" was not an actual total loss, for she was restored to her owner through the salvage services of the tug "Wallula", and as the policies did not cover partial losses, the question with which the court is presently concerned, is whether the cost of restoring the vessel to her former condition (i. e., before she was damaged) amounted to a sum sufficient to make a constructive total loss.

Abandonment Necessary.

It is settled law that the right to claim for a constructive total loss is conditioned upon an abandonment therefor being made. This court so held in

Soelberg v. Western Assur. Co., 119 Fed. 23, 29, wherein Judge Hawley said, while considering a policy of similar form to those in suit:

"There is a constructive total loss where the insured has the right to abandon."

And again, in

*Standard Marine Insurance Co. v. Nome Beach
L. & T. Co.*, 133 Fed. 636, 643,

Circuit Judge Ross, delivering the opinion of the court,
said:

“A constructive total loss is one upon the hap-
pening of which the insured may abandon the sub-
ject matter of the insurance.”

It is said by the author in

Am. & Eng. Ency. of Law, 1st ed. Vol. 14, p. 395:

“Notice of abandonment is absolutely essential
to enable the assured to recover for a constructive
total loss.”

So in

26 Cyc., 697,

it is said:

“An election and notice of abandonment is a con-
dition precedent to a claim for a constructive total
loss.”

Parsons on Insurance, Vol. 2, 107;

Arnould on Marine Insurance, 8th ed., Sec. 1092;

Phillips on Insurance, Vol. 2, Sec. 1491.

Conditions of Abandonment.

The pertinent question, then, is: Under what condi-
tions could appellee abandon the “Nottingham” as for
a constructive total loss? These conditions are ex-
pressly provided by stipulations upon the faces of the
policies and rules of adjustment on the backs thereof.

Clause 9 on the faces of the policies provided:

“It is also agreed that the insured shall not have
the right to abandon the vessel unless the amount

which this company would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured."

That is to say, the amount insured being \$30,000, *appellee did not have the right to abandon the "Nottingham" unless the amount which appellant would be required to pay under an adjustment as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds), would have exceeded \$15,000.* This, then, brings us to the further question as to the amount which appellant would have been liable to pay under an adjustment, as of partial loss for the labor and materials necessary to a restoration of the "Nottingham" to her former condition. The rules which would govern such an adjustment are embodied in clause 8 on the faces of the policies, and in the Rules of Adjustment on the backs thereof.

Clause 8 provided:

"It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by perils insured (except on anchors, copper and calking under the copper), as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage, and their proceeds deducted from the gross loss. And it is especially agreed that, instead of deducting one-third for new on the expense of remetaling, including docking and calking, there shall be deducted two and one-half per cent of the cost of remetaling, docking and calking, after deducting the value of the old metal and nails, for each and every month the metal shall have been on the vessel at the

time when it is taken off; and if it shall have been on forty months or more, the cost shall be wholly borne by the insured. In case the vessel shall be on a single bottom, the same rule shall apply to docking and calking, but one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured."

Rule II, Sec. 2 of the Rules for Adjustment of Losses, on the backs of the policies, the only part applicable to this case, provides:

"2. When a vessel is docked, or hove out for the two-fold purpose of remetaling (or, if on a single bottom, recalking) and repairing keel or bottom by reason of having collided or stranded, then the expense of docking or heaving out shall be proportioned pro rata upon coppering and (or) calking and other repairs, in the proportion of the number of days' work expended upon each respectively. The above rules shall also apply to wharfage, but no wharfage shall be allowed for, except when indispensably necessary to the repairing of the vessel."

We shall hereafter show that, based upon the bid of \$20,950 of the Albina Engine and Machine Works (Ap. 40, 50), and certain additions thereto, the amount which appellant would have been liable to pay under an adjustment as of partial loss for the labor and materials necessary to restore the "Nottingham" to her former condition, would fall far far below the required \$15,000.

Effect of Marginal Clause?

It is contended by appellee that the following clause on the margin of the policies,

“This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths ($\frac{3}{4}$) running down clause”,

overrides clauses 8 and 9 and the rules on the backs of the policies, and either (1) gave appellee the right to abandon under the general American law, to wit, if the cost of repairs amounted to one-half the value of the vessel repaired, or (2), if not overriding the policy provisions in their entirety, modified clause 9 so as to require the addition of general average and salvage charges to the amount which appellant would be required to pay under an adjustment as of partial loss for the labor and materials necessary to a repair of the vessel.

If appellee's first contention was sound, we admit that a constructive total loss existed. On the other hand, if the second contention should be accepted as establishing the grounds of abandonment under the policies, still, on the basis of any estimate properly to be considered on the evidence adduced, a constructive total loss would not be made out.

Marginal Clause Consistent With Body Provisions.

But we do not admit the correctness of either position. Appellant's contention, and we believe that every reasonable intendment of the policy sustains such construction, is that *the marginal clauses are not inconsistent with clauses 8 and 9, but that all of the provisions of the policies can be construed so as to give to all their full effect.* In doing so, a well settled rule of construction will be applied.

It was so held by the Supreme Court in

Merchants Mutual Ins. Co. v. Allen, 121 U. S. 67;
30 L. ed. 858-9,

wherein it was said:

“It is true that if there is a conflict between the written words of a policy, and those that are printed, the writing will prevail, but, *if possible, the writing and the print are to be construed so that both can stand.*” (Italics ours.)

Similarly, in

Seton v. Delaware Ins. Co., Fed. Cas. 12675,

the court said:

“But the construction of policies of insurance, is governed by the same rules as apply to other written instruments; and *if all the clauses can be fairly made to stand together, and to have effect, they should be so expounded as to produce such a result.*” (Italics ours.)

Marginal Clauses Definitive.

The marginal clauses are definitive of the kind of insurance provided by the policies, and neither detract from the full operation of the clauses in the bodies of the policies, nor add any liability thereto (Ap. 487, 492, 497-8). That this is true appears from a plain interpretation of the policy.

By examination of the original policies, the court will note that in clause 1, on the face, the words “unless amounting to at least..... per cent net” have been deleted with red ink. *The effect of this was to make the policy a total loss policy*, for it leaves the policy reading:

“but no partial loss or particular average shall in any event be paid under this policy” (Ap. 486-7).

When, then, the marginal clauses were also endorsed thereon providing: "This insurance is against total and/or constructive total loss * * *," *they but stated that which the policies, by the body provisions, already insured against, to wit, total and/or constructive total loss. The marginal clauses, in that aspect, then, were not inconsistent with, but only definitive of, the body provisions.* Were this not so, and had the intent been to *create* the total and constructive total loss, liabilities of the policies through the marginal clauses, then there must be attributed to the "red ink deletion" a needless act, for, if the marginal clauses were to override the body provisions, changes upon the latter were unnecessary.

The body provisions of the policies also insured appellee against general average and salvage charges under clause 6 and that portion of clause 3 stipulating:

"And all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which Insurers are liable, by the Rules and Customs of Insurance in San Francisco, including the Rules for Adjustment of losses printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this policy" (Ap. 495-6).

Sec. 2711 of the Civil Code of California provides:

"Where it has been agreed that an insurance upon a particular thing, or class of things, shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it become entirely worthless;

but he is liable for his proportion of all general average loss assessed upon the thing insured."
(Italics ours.)

Sec. 2744 provides:

"A marine insurer is liable for a loss falling upon the insured, through a contribution in respect to the thing insured, required to be made by him towards a general average loss called for by a peril insured against." (Italics ours.)

Sec. 2079 provides:

"Any person, other than the master, mate, or a seaman thereof, who rescues a ship, her appurtenances, or cargo, from danger, is entitled to a reasonable compensation therefor, to be paid out of the property saved. He has a lien for such claim, which is regulated by the title on Liens; but no claim for salvage, as such, can accrue against any vessel, or her freight, or cargo, in favor of the owners, officers, or crew of another vessel belonging to the same owners; but the actual cost at the time of the service rendered by one such vessel to another, when in distress, are payable through a general average contribution on the property saved."

Thus, by virtue of the above quoted provisions from clause 3, general average and salvage charges were already, without the aid of the marginal clauses, covered by the policies. Similarly with respect to claims under the three-fourths running down clause. The policies contained the following clause, printed, as were the body clauses, not typewritten, on the margin:

"It is agreed that, if the vessel hereby insured shall come into collision with any other vessel, and the insured shall in consequence thereof become liable to pay, and shall pay any sums not exceeding the value of the vessel hereby insured, in respect of

injury to such other vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned upon such goods by such other vessel the insurers will pay the insured such proportion of three-fourths parts of said sums as the amount hereby insured bears to the value of the vessel hereby insured (but not exceeding in any event the amount of this policy). But this agreement is in no case to be construed as extending to any sums which the insured may become liable to pay, or shall pay in respect of loss of life, or personal injury to individuals, from any cause whatever."

Marginal Clause Does Not Initiate Liability.

Thus, it is clear that *the endorsement of the marginal clauses upon the policies*, reciting:

"This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under the three-fourths ($\frac{3}{4}$) running down clause,"

imposed no additional liability upon appellant to that which would have existed if the marginal clauses had been left off.

That the marginal clauses could not have been intended to initiate liability is demonstrated by their wording: "*This insurance is against total and/or constructive total loss of vessel including * * * and/or claims under three-fourths ($\frac{3}{4}$) running down clause.*" Claims under three-fourths ($\frac{3}{4}$) running down clause! Manifestly, reference is made to some clause known as the *three-fourths ($\frac{3}{4}$) running down clause*. Where do we find it? Why, among the printed clauses of the policies. They are *claims* under that clause that are *included*. If *claims* under that clause, then that clause must create

liability for such losses under the policy. The clause elaborately provides the conditions and extent of liability for collision damages to other vessels. It *initiates* liability. If the marginal clause was intended to *initiate* liability on the part of the insurer for such losses, it is plain that it would be ineffective, because it makes no attempt to state what was meant by *claims* under a *three-fourths running down clause*. It was absolutely necessary to go elsewhere to ascertain the creating power which made such claims, or to find out what was included in such claims. *The clause was thus simply definitive, stating what the insurance created by the other policy conditions was: "This is insurance against * * *"*.

The marginal clauses, therefore, added nothing to the policies nor detracted therefrom. They were entirely consistent with the clauses in the bodies of the policies, and effect can and therefore should, be given to all without doing violence to any. The marginal clauses were, therefore, but definitive in character, succinctly stating the kind of insurance which the policy otherwise, by its body clauses, provided. *There is no reason, then, for holding that the marginal clauses overrode the other policy provisions.* In so deciding the District Court erred.

Marginal Clauses Silent on Abandonment.

There is nothing in the marginal clauses which, by any possible interpretation, refers to the right of abandonment. The clauses are silent upon the subject. Being silent, they are not, therefore, in conflict with clause 9, of the body provisions, which specifies the conditions on

which an abandonment can be made. The latter clause, as was said by the court in *Searles v. Western Assurance Co.*, 40 So. 866, in discussing a similar clause, "is just as much a part of the insurance policy as any other stipulation or condition contained in the policy". This being true, *then clause 9 must be given full effect unless the marginal clause is inconsistent therewith. But inasmuch as the marginal clause simply states the character of the insurance, and makes no mention of abandonment, or of the grounds on which an abandonment can be made, it cannot be inconsistent with the clause 9, which only relates to the right of abandonment.*

Clause 9 provides that:

"the insured shall not have the right to abandon unless the amount which this company would be liable to pay under an adjustment, as of partial loss for labor and materials (*exclusive of salvage or general average expenses and the cost of funds*) shall exceed half the amount hereby insured." (Italics ours.)

Marginal Clause Does Not Modify Abandonment Clause.

Appellee contends that, because the marginal clause provides:

"This insurance is against total and/or constructive total loss of vessel *including* general average and/or salvage charges and/or claims under the three-fourths ($\frac{3}{4}$) running down clause" (italics ours),

that clause modifies, if it does not entirely override, clause 9, so as to require general average and salvage charges to be added to the amount which appellant would be liable to pay under an adjustment, as of partial loss

for labor and materials for the purpose of determining whether appellee had the right to abandon. This suggestion is made solely because of the use of the word *excluding* in clause 9, and of the word *including* in the marginal clause, and yet they are not used in the same context in any respect. In the one case (marginal clause), it is used in stating what the insurance is against; in the other, what shall not be taken into consideration in determining whether the right to abandon exists. The marginal clause makes no reference to abandonment; clause 9 has nothing to do with the kind of insurance, for it is alone concerned with the conditions on which the right of abandonment exists. There is, then, nothing in the wording of the two clauses, or in the functions which they perform, by which the one can be said to be inconsistent with, or even have anything to do with, the other.

The fallacy in appellee's contention is easily exposed. *The words*, or provision, as it may be termed, in the marginal clause "*and/or claims under three-fourths running down clause*" stand in exactly the same relation to the balance of the clause as do the words "*general average and/or salvage charges*". If, therefore, by virtue of the wording of the clause: "*including general average and/or salvage charges * * **", *general average and/or salvage charges are to be added* to the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials (clause 9), for the purpose of determining whether the right to abandon exists, *then, equally must claims under the three-fourths running down clause be so*

added. But this is a manifest absurdity! An examination of the three-fourths running down clause at once discloses that it insures appellee against three-fourths of its liability for damages done to another vessel with which the "Nottingham" might be in collision. Now, the basic principle upon which the doctrine of constructive total loss rests, and has always been founded, is that of damage to the insured vessel. English law provides that the cost of repairing the damage must exceed the value of the insured vessel when repaired; American half the value. By policy terms, other conditions have been for years prescribed. *It would do violence, then, to every principle upon which the theory of constructive total loss is based, to hold that claims under a three-fourths running down clause could be added to the cost of repairing the physical damages to the insured vessel, to make such a loss.* And yet, if by virtue of the marginal clause, it is held that general average and salvage charges are to be added to the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials, *claims under the three-fourths running down clause must also be added.*

How unreasonable it would be to hold that, if the "Nottingham" had sunk the "Manchuria", valued at two millions, under circumstances which rendered the former liable, and had herself suffered only slight injuries, the "Nottingham" could have been abandoned under the policies as for a constructive total loss. The absolute absurdity of the proposal is its best refutation.

Is it any wonder, then, that *every witness* questioned upon the subject, *including the manager of the adjusting department of the firm employed by appellee to make an adjustment in this very case*, which firm had in previous years placed appellee's insurance, *stated that he had never heard of claims under a three-fourths running down clause being so added* (Ap. 489, 498-9, 502). No recorded decision can be found, so far as we are aware, in which it has been done. We challenge appellee to cite the court to one!

Abandonment Clause Enforceable.

It is appellant's contention, therefore, that a rational construction does not make it possible to hold that general average and salvage charges are to be added to the amount which it would be liable to pay under an adjustment as of partial loss for the labor and materials necessary to a restoration of the "Nottingham", for the purpose of determining whether the right to abandon existed. If not, then the marginal clause is not inconsistent with, and does not override, clause 9, but that *effect is still to be given clause 9 in accordance with its terms*.

Furthermore, there can be no possible conflict between the marginal clause and clause 8 of the body, for they do not touch upon, or in any way refer to, the same matter. Clause 8 has to do alone with the determination of liability under an adjustment of partial loss. So with the Rules of Adjustment on the backs of the policies. By no strained construction, then, can the marginal clauses be said to override

and supersede these clauses. The latter are, and remain, therefore, fully operative as the rules by which the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials, is to be made. And having determined that, clause 9 comes in and provides that if such amount exceeds half the insurance, the right to abandon exists.

In these circumstances, we most respectfully submit, that the District Court erred in holding that the marginal clause changed the stipulations in the body materially. How they were changed or wherein the marginal endorsement could not be reconciled with the body of the contract, the court did not attempt to say. It contented itself with simply so saying in a paragraph inserted in a portion of its opinion in which it was discussing the seaworthiness of the vessel.

All Clauses Consistent.

There is no inconsistency in any of the clauses. Every intendment, therefore, will be given full effect by the court holding that the policies are, as the marginal clauses state, and the body provisions create, against total and/or constructive total loss of the vessel including general average and/or salvage charges and/or claims under the three-fourths running down clause, and by holding that the right to abandon as for a constructive total loss is fixed by the provisions of clause 9 and its dependent clauses. That is as the policies are. In so holding, the court will be applying the settled principles of construction, as enunciated in the foregoing cases.

Policy Conditions Enforced.

Policies of the form in suit have long been in use (Ap. 485), and consistently enforced by the courts.

- Hall v. Franklin Ins. Co.*, 9 Pickering 466;
Winn v. Columbian Ins. Co., 12 Pickering 278;
Deblois v. Ocean Ins. Co., 16 Pickering 303;
Orrok v. Commonwealth Ins. Co., 21 Pickering 456;
Allen v. Commonwealth Ins. Co., 1 Gray 154;
Bullard v. Roger Williams Ins. Co., Fed. Cas. 2122;
Wallace v. Thames & Mersey Ins. Co., 22 Fed. 66;
Soelberg v. Western Assn. Co., 119 Fed. 23;
Arnold on Marine Insurance, 8th ed., Sec. 1134;
Phillips on Insurance, 5th Ed., Sec. 1544;
Barber on Principles of Insurance, p. 307.

This form of policy was first adopted by the Boston Underwriters as early as 1830, following the prolonged litigation in the Argonaut case.

Peele v. Insurance Co., Fed. Cas. 10905.

Its validity has been recognized by this court in

Soelberg v. Western Assur. Co., supra,

wherein District Judge Hawley, in considering a policy of the same form, said:

*“Parties must be governed by the terms of the contract which they have entered into, and are not bound by the rules which apply only to other and different kinds of contracts. * * **

“In order to entitle the plaintiffs to recover it is essential for them, by competent proof, to show a loss which comes within the terms of their policy of insurance. They must bring their case within

the provisions of the contract for insurance. They are bound by the lawful agreements and stipulations therein contained, and must satisfactorily prove a loss. The burden is, of course, upon them to establish their right to recover. This general principle is supported by abundant authority. * * * (Citing cases.)

“We are of opinion that these authorities sustain the proposition that the evidence in this case, which consists of mere proof that the cost of repair would exceed the value of the ship when repaired, does not, under the provisions of the policy, prove either an actual total loss or a constructive total loss, and does not prove a partial loss. * * *

“But it is unnecessary to decide in the present case whether the amount of the insurance of \$15,000 in the one case, of \$5000 in the other, or \$75,000, the value of the ship mentioned in the policy, constitute the basis of the computation, *because no evidence appears in the record to give any basis whatever for the determination of the percentage of damage.* The only evidence in this regard is confined solely to the proposition, heretofore stated, that the vessel when repaired would not be worth the cost of repairs, which is, as we have heretofore attempted to show, wholly insufficient.” (Italics ours.)

Evidence for the determination of the percentage of damages was necessary in that case, because the policy contained clauses, also numbered 8 and 9, identical in terms with clauses 8 and 9 of the policies in suit. Evidence to form a basis of computation under those clauses was necessary, both to the determination of the partial loss and of the right to abandon as for a constructive total loss. Thus full vigor was recognized by the court as inhering in clauses 8 and 9.

The validity of a very similar policy was affirmed, and the policy enforced, in the case of

Searles v. Western Assur. Co., supra,

wherein suit was brought for a constructive total loss. The right to abandon rested upon the following condition:

“There shall be no abandonment as for a constructive total loss in consequence of any loss or damage, unless the cost of the necessary repairs required solely by the disaster, exclusive of cost of raising and rescuing the vessel and taking her to the dock and any general average charges, be equivalent to seventy-five per cent of the agreed value of the vessel, as specified herein.
* * * ”

Of the binding effect of the policy conditions, and particularly of those prescribing the grounds on which abandonment could be made, the court said:

“There are many definitions as to what constitutes a constructive total loss, and, when a constructive total loss is claimed because of damage done the vessel by the perils insured against, the English and American authorities are not in accord as to the extent of the damage required before the insured is justified in abandoning the vessel, and claiming the amount insured for as being due him on account of a constructive total loss.

“But we have no concern with the conflict of decisions, since the insurance company by express stipulation in the contract of insurance has removed that question from the controversy by stipulating what amount of damage shall constitute a constructive total loss, since it is provided in clause 8 of the policy that ‘there shall be no abandonment as for a constructive total loss in consequence of any loss or damage, unless the cost of the necessary repairs required solely by the disaster (exclusive of the cost of raising or rescuing the vessel

and taking her to the dock and any other general average charges) be equivalent to 75 per cent. of the agreed value of the vessel as specified herein.' Therefore, as the facts in this case show that the damage to the vessel was caused by a storm on the river, one of the perils insured against under the policy, we may define a constructive total loss, as applied to this case, to be such a loss as that the repairs made necessary thereby, exclusive of raising or rescuing the vessel and taking her to the dock, would be equivalent to 75 per cent. of her value. 14 Ency. of Law (1st Ed.) 390, and authorities there cited; Vance on Ins., 557. * * *

"The clause in the insurance policy which enables him to make an abandonment in a proper case, and determining the conditions under which the abandonment may be made, is just as much a part of the insurance policy as any other stipulation or condition contained in the policy.

"Appellant undertakes to show his right to abandon the vessel as for a constructive total loss by showing that there were no facilities at Vicksburg for raising a vessel, and it was therefore impossible for him to do so, and that the nearest dock where the vessel could have been docked was New Orleans, some 400 miles away by river, and make this an element of damage, showing as to him the boat was worthless, and therefore he had the right, under his policy, to abandon and sue for a constructive total loss. * * *

"But the insurance company has not undertaken to guarantee facilities at Vicksburg for raising vessels, nor cost of carrying her to the dock. The policy was given by the insurers and accepted by the insured under such conditions and with such facilities as Vicksburg possessed. * * *

"Therefore, in determining whether appellant had the right to abandon the vessel and sue for a constructive total loss, we consider only the cost of necessary repair, caused solely by the disaster, which in this case is shown to be much less than 75 per cent. of the agreed value."

It, therefore, follows that the right of appellee to abandon its interest in the "Nottingham", as for a constructive total loss, was determinable by the conditions of clause 9, and that such right did not exist unless the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) should exceed half the amount insured, to wit, \$15,000.

The evidence shows that it would not.

THE EVIDENCE SHOWS THAT THE AMOUNT WHICH APPELLANT WOULD BE LIABLE TO PAY UNDER AN ADJUSTMENT OF PARTIAL LOSS FOR LABOR AND MATERIALS * * * DID NOT EXCEED \$15,000.

But first as to the notice of abandonment.

Written Notice of Abandonment.

The "Nottingham" was towed into Astoria on Sunday, the 15th, the day after the master and crew were landed (Ap. 284-5). On the morning of the next day, the 16th, a written notice of abandonment was served upon Frank G. Taylor, agent of appellant, at his Seattle office (Ap. 157-8). This was immediately refused (Ap. 338, Exhibits 16, 17). The giving of the notice of abandonment was pleaded in the libel, and a copy of it attached thereto as an exhibit (Ap. 6-7, 12). The libel was filed on May 13, 1912, and the evidence referred to was taken in July and September, 1913, at Seattle.

Alleged Verbal Notice of Abandonment.

Thereafter, on November 13, 1913, at the close of his deposition given in San Francisco Mr. Thorndyke, manager of appellee, testified that late in the afternoon of the 14th, the day the master arrived at Astoria, and the day before the "Nottingham" was towed in, he called Mr. Taylor, agent of appellant, by telephone, and notified him that he had received a telephone message from Mr. Plummer, of the Puget Sound Tugboat Company, wherein Plummer said to him: "Thorndyke, did you hear about the 'Nottingham', " and he (Thorndyke) said "No"; and thereupon, Mr. Plummer stated that "the 'Nottingham' had been dismasted and waterlogged and abandoned at sea and the crew taken off by the schooner 'David Evans', that he had received a wireless message from a master of one of his tugs to that effect". Thorndyke then said that he also stated to Taylor "that the 'Nottingham' has probably gone, it would be the last of her, and that I guessed now she belonged to the underwriters, and, in that way, informed him of our intention to abandon the vessel because she was lost, she was dismasted and waterlogged, and had no crew aboard, and was lost on the ocean" (Ap. 551-3).

At the conclusion of that testimony, counsel gave notice of his intention to apply for leave to amend the libel, to allege abandonment on the 14th of November (October), instead of at the time alleged in the libel already filed (Ap. 553). An amended libel was filed on March 10, 1914 (Ap. 118).

On cross-examination, it appeared that this alleged "verbal abandonment" had come to Thorndyke's mind after he had given his testimony at Seattle in July and September. What it was that had served to refresh his recollection, he could not say. He had been examined upon the matter on the former occasions, but had then made no reference to the so-called verbal abandonment. He had in the meantime, however, read over his testimony and discussed with counsel the bearing that they thought it would have upon the case (Ap. 553-560).

Immediately after the deposition of Mr. Thorndyke was taken, Mr. Taylor was called as a witness in the case, and testified that he left Seattle on the nine o'clock boat for Tacoma on the morning of October 14th, and that he did not return home until nine p. m. He produced a diary which contained a careful record of his movements and doings on the 14th, thus corroborating his own recollections. Mr. Taylor was not in his office at all that day, and most emphatically stated that he had no telephone communication with Thorndyke on that day, and that the first time notice of abandonment was given, was on the afternoon of the 16th, when the written notice was served (Ap. 448-457).

Appellee did not know of the existence of the diary when Mr. Thorndyke testified to his *new* recollection. Its entries confounded them, and effort has been made, and doubtless will be renewed in this court, to get away from its effect by suggesting that the information which Mr. Taylor got late at night, after his return

home, and which he thought, and had reason to believe, came as customary from the Merchants Exchange, but frankly admitted could not be stated with absolute certainty, was received from Mr. Thorndyke. *But Mr. Thorndyke never stated, or suggested, that he talked with Mr. Taylor after nine o'clock at night. His testimony on November 13, 1913, was that the alleged conversation was with Mr. Taylor in the afternoon, while the latter was at his office.* Explanation of the discrepancy cannot be explained upon that ground.

It is certain that there never was a conversation between Taylor and Thorndyke on Saturday, the 14th. The giving of a notice of abandonment was a matter of great importance to both Mr. Thorndyke and Mr. Taylor. So much so, indeed, to the former, that it is now stated that the draft of the notice served on Monday afternoon, was prepared by one of the counsel for appellee, at his home, before eleven o'clock on Sunday morning (Ap. 558).

It appears from the diary that Mr. Taylor was a most methodical man in the conduct of his business, making careful entry of his transactions day by day. It seems only reasonable, therefore, that if notice of abandonment had been given at any other time than that noted in the diary, either verbally, or in writing, that Mr. Taylor would have made a like notation. If Mr. Thorndyke had gone outside of business routine, and called Mr. Taylor at the latter's home late on Saturday night, the 14th, to abandon to him the "Nottingham", is it not reasonable to believe that he would have had *some* recollection of that act at the time he

testified in July and September, 1913, when he was specifically asked about the abandonment which had been made, or at least when he was advising with counsel in preparation of the case?

Charity induces us to say that Mr. Thorndyke was mistaken. He never gave any notice of abandonment on Saturday, or at any other time prior to the delivery on Monday afternoon of the written notice which had been drafted on Sunday morning. *If abandonment had been made on Saturday night, why the haste in preparing a written notice on Sunday morning, before eleven o'clock, which notice was not in confirmation of, and made no reference to, an attempted abandonment on the night before?* The fact is that Mr. Thorndyke's memory was unreliable. This is not only shown by the continued evasiveness of his answers throughout his testimony, but is most emphasized by the remarks of his own counsel, who said to him, at the time his deposition was being taken in San Francisco, immediately after he had testified to the new recollection, "*there is no use testifying to things that are manifestly untrue*" (Ap. 557).

Verbal Abandonment Insufficient.

But even if the alleged conversation had taken place with Taylor, it did not constitute a sufficient abandonment. Mr. Thorndyke said that his words of abandonment were:

"And I also stated to Taylor that the 'Nottingham' had probably gone, it would be the last of her, and that I guessed now she belonged to the underwriters" (Ap. 552.)

And again:

“I stated to him the telegram. I stated to him regarding the wireless that Plummer reported that he had received, and I also stated that the ‘Nottingham’ was apparently a goner, as I remember using the expression at that time; that she was lost” (Ap. 560).

There were no words of transfer or of conveyance in either statement, by which appellee surrendered up to appellant, its interest in the “Nottingham”, and yet that is the requirement of a valid abandonment.

Patapsco Ins. Co. v. Southgate, 5 Peters 604;
8 L. ed. 243.

We submit, therefore, that no abandonment was made on Saturday, the 14th, as alleged in the amended libel.

Furthermore, Mr. Thorndyke had no power to make a valid abandonment.

Verbal Abandonment Unauthorized.

It is alleged in the libel and admitted in the answer that the “Nottingham” was mortgaged to the Trust Company of America. Mr. Clise testified that he looked after the administrative affairs of The Globe Navigation Company, and Mr. Thorndyke after the operations of the vessel. Mr. Clise also stated that he likewise looked after the Trust Company’s interests as trustee of the mortgage bonds (Ap. 339). After thus testifying, Mr. Clise said that a written notice of abandonment (Exhibit 16) was given under his direction, acting as the representative and attorney of both The Globe Navigation Company and the Trust Company of America (Ap. 340).

When Mr. Thorndyke's deposition was taken in San Francisco, however, he revealed the fact that Mr. Clise was not in Seattle at all, but was in San Francisco when the written notice of abandonment was given (Ap. 560). How, then, the written notice of abandonment was given under the latter's direction is not disclosed to us. But be that as it may, there is no evidence to show that Mr. Clise, as the only authorized representative of The Globe Navigation Company, or the Trust Company, had any knowledge of the alleged verbal abandonment until after Mr. Thorndyke took the matter up with his counsel nearly two years after the loss (Ap. 560).

There was, then, no valid verbal abandonment, even if credence be given to Mr. Thorndyke's testimony regarding the alleged conversation.

It is stated in *Arnould on Marine Insurance*, 8th ed., p. 1433:

“So, again, it has been there (United States) held that if the assured by mortgaging his ship has voluntarily deprived himself of the power of conveying an absolute title, he cannot abandon, but can recover only for the damage he has actually sustained as a partial loss.”

Soelberg v. Western Assurance Co., supra;

Gordon v. Mass. F. & M. Ins. Co., 2 Pick. 249.

Court's Confusion About Abandonment.

It is important to note the apparent confusion of the District Court between an abandonment as for a constructive total loss under the policies, and the physical abandonment of the vessel by the crew at sea. They were totally dissimilar abandonments, bearing no relation whatsoever to each other.

The court then referred to a provision of the Civil Code of California as prescribing the grounds upon which an abandonment could be made. It also quoted an excerpt from *Cyc.* *But neither of those provisions had anything to do with the right of abandonment under the policies in suit, for the policy stipulations fixed the conditions upon which abandonment could be made.* This was clearly pointed out in

Soelberg v. Western Assur. Co., supra;

Searles v. Western Assur. Co., supra.

That the District Court could not have considered section 2717 of the California Civil Code, or the rule in *Cyc.* (29 *Cyc.*, 692) applicable, is shown by the fact that when it came to make its computation to determine whether there was a constructive total loss, *the court made a deduction of one-third new for old from the cost of repairs.* Now, *neither the Civil Code provision nor the rule in Cyc. authorized such deduction.* When, then, the District Court made it, it was not applying those rules to the present case.

Such deduction was not authorized by the marginal clause, but only by clause 8 in determining liability under an adjustment as of partial loss for labor and materials. Such basis of ascertaining the right to abandon was prescribed by clause 9. Hence the District Court must have been attempting to apply *those clauses* to the facts. This is further shown by the court saying that

“in determining whether there is liability, the court must determine whether the loss was more than one-half of the payment required under the policy”.

Such condition to liability is alone provided by clause 9. No provision of that character is found in the California code, the general law, or the marginal clause. The court, then, must have intended to apply the conditions of the body clauses to the facts, but did so erroneously.

Adjustment as of Partial Loss.

After the "Nottingham" was taken into Astoria, she was towed up the river to St. Johns (adjoining Portland) and there drydocked *for the purpose of ascertaining the cost of repairs, so as to determine whether she was a constructive total loss under the policies* (Ap. 370-1).

Much is attempted to be made of the risk of that towage, but it clearly appears from the testimony of Captain Gibbs and the master that such risk as there may have been, was only such as is incident to every towage on the Columbia River between the same ports. At the time it was made, the "Nottingham" was free of water and was not drawing as much water as when she went to sea, because, by the loss of her deck load and masts, her burden had been lightened (Ap. 322).

Repair Specifications Prepared.

Upon being drydocked, the "Nottingham" was surveyed, on December 21, 1913, by Frank Walker, representing appellee, and Captain Crowe, deceased, representing appellant. Following such survey, Mr. Walker prepared specifications for her repairs (Ap. 162, 173), and bids for the same were called thereon (Ap. 162, 173-4, Exhibit 1).

Bids for Repairs.

Captain Crowe furnished the names of parties in Portland who might bid on the vessel. To these, copies of the specifications were handed, and bids asked. Four tenders were received, as follows: Oregon Drydock Company, \$25,200; St. Johns Shipbuilding Company, \$23,070.75; Vulcan Iron Works, \$24,600; and *Albina Engine and Machine Works*, \$20,950 (Ap. 41, 162-3).

The specifications provided as part of the requirements:

“Tenders are hereby requested for making the following enumerated repairs and supplying all of the sails, stores, outfit and equipment contained in the list attached to this specification.

“Vessel to be taken from where she now lies by the contractor and returned to same berth by him or them after all repairs are completed, contractor to pay all costs of removal and return.

“It being the intention of the following specification to briefly describe the spars, running and standing rigging, iron work, sails, etc., necessary to place vessel in the same good condition as before the accident, therefore the contractor will be called upon to observe not only the letter but the spirit of the contract. The work called for under this contract to include the removal of the stumps of the old masts, the removal of the old chain plates and all work and labor necessary to install the new spars, iron work, running and standing rigging, sails, blocks, outfit, equipment and gear, and all rigging to be set up, seized off, served and sails bent in readiness to sail, to the satisfaction of the master or owner’s representative.”

Accompanying the specifications was the following letter, attaching conditions to the bids:

“Owing to an agreement owners have with the Port of Portland Commission, the vessel must be docked on their floating dock at St. John’s incident to necessary bottom repairs, therefore in making tender for this work, bidders must agree with the owners to carry out that arrangement, bidders of course paying all dockage and other costs.

“*Time is not the great issue herein; but owners will weigh difference in time submitted to be consumed for doing the work, therefore bids should plainly set forth the number of running days he will consume to do the work.*

“*All bidders should submit with their tender a statement from a reliable indemnity company agreeing to furnish surety bonds in sum required in the specifications.*

GLOBE NAVIGATION COMPANY, LTD.”

Albina Bid Lowest.

The bid of the Albina Engine and Machine Works was the lowest. If an adjustment as of partial loss for labor and materials, under the rules of the policies, had been had upon the cost of repairs as fixed by that bid, the amount which appellant would have been liable to pay, would have fallen far, far below the required \$15,000. We do not think that counsel will dispute it. Certainly there is no evidence to the contrary.

The bid was not accepted, however, and the vessel was not repaired at that time.

Walker’s Supplemental Report.

On March 4, 1912, Mr. Walker made a supplemental report of survey in which he added materially to the repairs to be made to the “Nottingham”, over and above those called for by the specifications. It will be remembered that *the original specifications were drawn*

to cover the repairs of the damage to the vessel which resulted from this trouble. Mr. Thorndyke so testified (Ap. 173). The elaborateness of the specifications, the detailed list of stores required, the aforementioned expression of the intention of the specifications, the conditions in the call for tenders, all permit, indeed force, the reasonable conclusion that the specifications were drawn by appellee's surveyor to cover all the work necessary to restore the vessel to a seaworthy condition. It was admitted by appellee's manager that the purpose of drydocking the vessel was to see if it was a total loss under her policies, for the purpose of ascertaining whether or not appellee had a claim under its policies against appellant (Ap. 371). The specifications were based upon the surveys made by the insured's and insurer's representatives, when the vessel was on the drydock for the aforesaid purpose. Is it reasonable, then, to believe that Mr. Walker could have thought that the repairs, as provided by the specifications, would not have restored the vessel to her former condition? Appellee was entitled to have its right against appellant measured by such requirement. If the specifications were insufficient, and Walker was conscious of it, then he was more than derelict in his duty to his employer. But no such claim is made by appellee. The reasonable conclusion to which we are thus driven by all of the circumstances, is that the specifications were broad enough to fulfill their intended purpose of providing for a thorough repair of the vessel. By them, therefore, the needed repairs should be determined.

The supplemental report, as is readily demonstrated, not only duplicated repairs required by the specifications, but called for work that was not needed, and that would not have repaired any damage caused by the disaster. The report was made on March 4, 1913; the original specifications were drawn immediately after the survey in December. Between those dates, Walker admits that he was not on board the "Nottingham", though he says that he saw her in passing up and down the river (Ap. 198). *It is thus conceded that Walker must have possessed, at the time he prepared the original specifications, all of the information which he had on March 4th, and from which he drew his supplemental report.* How, then, can it be asserted that the supplemental report should be accepted as covering repairs necessary to restore the vessel to her former condition? Walker would have us believe that the repairs provided by the supplemental report, were needed, but were omitted because Captain Crowe would not agree to them. It is imposing on credulity to ask us to accept that explanation, for *it does not sound in reason to say that Walker, in an effort to ascertain the loss for the purpose of determining liability under the policies, omitted at the request of the representative of appellant, such extended additional repairs as those set forth in the supplemental report.*

On December 21, 1911, appellee sent the following telegram to the master:

"Walker disagrees with Captain Crowe views about leak, he thinks top sides responsible. *Wants you to make thorough examination of top sides look especially for rooms make no mention of what you*

learn over there. Please make examination Friday. Bring equipment list with you'' (Ap. 317). (Italics ours.)

The master made his secret examination. He says that he examined the vessel thoroughly all over; that he swung stages on both sides and went all around the vessel and examined the whole top side, the butts and the seams, especially around the stern post. And with what result? Other than a seam along the stern post, a few soft spots under the counter, *he found the other seams in as good condition as when she went to sea* (Ap. 317-319). Walker had that information when he drew his specifications on Jany. 1, 1912. And what did he provide in them regarding outside hull repairs? The requirements are found on pages 101 and 102 of the Apostles, and showed a thorough going over and repair, and concluded by specifying that before the ship was again placed in water, the entire planking of hull to be searched for leaks with hose on inside. *Manifestly, that contemplated that the hull, in which Captain Swenson found the seams in good condition, was to be placed in a seaworthy state.* Mr. Mackintosh, who was to do that work under the Albina Engine and Machine Works' bid, understood that he would be required, under the tender, to correct any leak that developed (Ap. 86).

Following upon the survey of Walker, the secret survey of Captain Swenson, and the preparation of the specifications, Walker, without in the interim being aboard the vessel, on March 4, 1912, made up his supplementary survey, in which he provided for *the calking of the entire hull up to the bulwarks*, the seams cemented

and painted. What basis can there be for asking that this supplemental report be taken as correctly embodying repairs necessary to restore the "Nottingham" to a seaworthy condition? Absolutely none, and that this was so, was afterward admitted by counsel, who stipulated during the hearing, *that it was not necessary to calk the bottom from the third flank below the light load line down, except as provided in the original specifications; that it was not necessary to remove any portion of the shoe, except that provided in the original specifications* (Ap. 348-9).

The original specifications provided for the removal of the after length of the shoe (Ap. 102).

Supplemental Report Discredited.

Thus, it was established that the supplemental report, in two of its most important requirements, was wrong.

The supplemental report also provided for the calking of the entire deck (Exhibit "J"). The original specifications required the calking of certain carefully designated deck seams. Which was correct as to the requirement of repairs needed to restore the "Nottingham" in December to her former condition? If this court will but read a few pages of the Apostles, commencing on page 202, in conjunction with the photograph (Exhibit "2") there being used, it will quickly discern that Mr. Walker, in preparing the specifications, the items of which by his testimony he was pointing out upon the photograph, must have gone over the deck of the vessel in December with absolute thoroughness. He could not have specified the calking of the feet of all bulwark

stanchions, around the hatches, one seam on each side for the full length of the vessel, four seams along the waterways, alleyways under forecastle head, forecastle head deck searched for leaks, and all seams pitched or puttied, without, at the same time, having observed the remainder of the deck seams. Having so carefully specified the needed calking in December, we submit that the original specifications should be taken as prescribing the needed repairs to the decks, and not the supplemental report made three months after the former, during which interim the decks had not been seen by Mr. Walker. *In view of the already admitted incorrectness of the supplemental report, appellee should be held bound by the specifications.* To so hold, the court would be but accepting the finding of the shipbuilder Nelson, an independent surveyor employed by the Port of Portland, who testified that he examined the "Nottingham" in the dock, and found her outside calking good, and the decks very good, except a little loose along the covering board (waterways) (Ap. 444). The original specifications covered the latter.

In its most important requirements, the supplemental report thus stands absolutely discredited.

Walker-Gibbs Agreement.

On March 27, 1912, Captain S. B. Gibbs, acting for appellant, and Mr. Walker, acting for appellee, agreed upon the following modifications of the original specifications, relating to the repairs:

1. The renewal of the mast-steps was considered unnecessary, and the cost thereof estimated at \$30;

2. The overhauling of the fore-rigging was considered necessary, but the original estimate of \$150 was reduced to \$75, and thus a credit of \$75 allowed upon the original estimate;

3. Paint for the deck was considered unnecessary, and the difference in cost between paint and tar was estimated at \$25;

4. A second coat of copper paint over the entire bottom was considered unnecessary, but it was agreed that the bare spots should receive two coats, and that one coat was sufficient for the remainder. The difference was estimated at \$80;

5. Appellee originally claimed a total loss on one foresail, one foregaff topsail and one forestay sail, the value of which was estimated at \$550. It was agreed that the damage to the sails was only \$75, thus making a credit difference of \$475;

6. It was agreed that the four gaff topsails and full suit of sail covers and five coils of manila rope stored in the 'tween deck storeroom, were unfit for further use. The value of these was estimated at \$400. The replacing of those sails, etc., however, was covered by the original specifications (see Ap. 102), providing for seven gaff topsails.

7. It was agreed that the damage to the stanchions and cast-iron chocks occurred before the present voyage, and the credit agreed to be allowed on the cost of repairs, was \$50;

8. It was agreed that the calking of all of the stanchions of the back wash strake and the testing of cargo

ports, and any required calking of the same, was necessary. The original specifications covered the calking of all the bulwark stanchions.

No agreement was reached as to the necessity of calking the entire main deck, the removal of the shoe from the keel and renewing the same, or the resalting of the vessel, or the removal of sheet iron from under the hose pipes. The necessity of calking the entire main deck, we have just considered. It was subsequently stipulated that the removal of the shoe, except as covered by the specifications, was unnecessary. It was likewise stipulated that the cost of resalting the vessel was \$600 (Ap. 348-9).

Repairs Required.

The required repairs to restore the "Nottingham" to her former condition were those covered by the original specification and the agreements of the Walker-Gibbs stipulation of March 27th.

Effect of Clause 9.

Returning again to the provisions of clause 9, which determined the right of abandonment, we find that the *right of abandonment did not exist unless the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials * * * should exceed half the amount insured.* This necessitated the ascertainment of what appellant's liability would be under such an adjustment. To determine that, appellant had such an adjustment prepared by an average adjuster. His adjustment was based upon the

Albina Engine and Machine Works' bid of \$20,950, and the Walker-Gibbs agreement (Ap. 465).

Effect of Clause 8.

This adjustment was governed by the conditions of clause 8 which provide for a *deduction of one-third from the cost of all repairs of injuries and losses on the vessel by perils insured against (except on anchors, copper and calking under the copper) as a commutation for the average difference between new and old.* The clause also provided that *instead of deducting one-half for new on the expense of remetaling, including docking and calking, there should be deducted two and one-half per cent of the cost of remetaling, docking and calking after deducting the value of the old metal and nails for each and every month the metal shall have been on the vessel at the time when it is taken off; and if it shall have been on forty months or more, the cost shall be wholly borne by the insured.* It further provided that *in case the vessel should be on a single bottom, the same rule shall apply to docking and calking, but one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured.*

Rules of Adjustment.

In order to properly pro rate the cost of docking, section 2 of Rule 2 of the Rules for Adjustment of Losses on the back of the policy came into operation. That section provided that, "*when a vessel is docked or hove out for the twofold purpose of remetaling (or, if*

*on a single bottom, recalking) and repairing keel * * * then the expense of docking or heaving out shall be proportioned pro rata upon coppering and (or) calking and other repairs in the proportion of the number of days' work expended upon each respectively * * *."*

Segregation of Repairs.

To make the adjustment, in accordance with the foregoing rules, a segregation of the cost of the repairs was necessary. This was done with the tender of the Albina Engine and Machine Works, at the instance of appellant, through the testimony of Wm. Cornfoot and Robert Mackintosh, who prepared the bid and were to do the work and furnish the materials under the tender. Mr. Cornfoot testified that in the bid, the allowance for consumable stores was \$1500 (Ap. 50); the allowance for cabin furniture, fixtures, etc., was \$1000 (Ap. 51-53). Mr. Mackintosh stated that the allowance for drydock dues was \$382 (Ap. 76); the allowance for painting bottom, both labor and materials, was \$330 (Ap. 77-8); and the allowance for calking and cementing bottom was \$175 (Ap. 78). The foregoing items totalled \$3387. Deducting that amount from the Albina bid of \$20,950, for those items were covered by the bid, there was left \$17,563 to cover the balance of the repairs to be made as required by the specifications (Ap. 466-471).

Credits and Additions to Repairs.

The adjustment also included the credits covered by the Walker-Gibbs agreement, to which we have referred.

Under its terms, a credit of \$30 for renewal of mast-steps was allowed. (Note: The allowance under the bid was \$120 for this item [Ap. 84-5]); a credit of \$75 was allowed on the overhauling of the forerigging; \$75 on the deck painting; \$80 for copper bottom painting (one coat instead of two, as required by the specification [Ap. 102]); \$475 for the three sails, valued at \$550, and only damaged to the extent of \$75; and \$50 for damage to stanchions and iron chock which occurred before this voyage. The foregoing deductions were made from the Albina bid because it included those items.

There was added to the repairs, not in the specifications, the salting of the vessel, the cost of which was stipulated to be \$600 (Ap.....), and calking the stanchions back of the wash strake, the cost of which was \$277.50, as given by Mr. Hubbard, a Puget Sound shipbuilder (Exhibit 8).

Also included in the adjustment was the cost of dry-docking the vessel for the preliminary survey, from which the specifications for repairs were drawn. The cost of such dockage was \$79.34, as shown by the Johnson & Higgins' general average adjustment (Ap. 479-480).

Results Shown by Adjustment; No Right to Abandon.

The foregoing costs covered the complete repair of the vessel as provided by the original specifications, as modified and supplemented by the Walker-Gibbs agreement.

With this segregation of costs in hand, the adjuster applied to those costs the rules of adjustment as pro-

vided in clause 8, and Sec. 2, Rule II of the Rules of Adjustment on the back, of the policy. *In this way, he ascertained, in accordance with the requirements of clause 9, and the conditions of the policies, the amount which appellant would be liable to pay under an adjustment as of partial loss for labor and materials: It amounted to the sum of \$9540.66. This was \$5459.34 less than half the amount insured.*

Appellee, therefore, did not have the right to abandon as for a constructive total loss.

Adjustment Correctly Stated.

The adjustment, as thus stated, was in strict accordance with the settled practice of making adjustments, as of partial loss for labor and materials, under policies of the kind covering on the "Nottingham" (Ap. 478). That the adjustment was correctly made up, was admitted, and testified to, by Mr. Bishop, manager of the adjusting department of Johnson & Higgins, a leading firm of average adjusters, who, in fact, had charge of the stating of the general average adjustment on the "Nottingham", as a result of the losses suffered and expenditures incurred on the voyage here in question (Ap. 501, 528-31).

In exposition of the principles upon which an adjustment, as of partial loss for labor and materials, should be made up under the policies covering on the "Nottingham", Mr. Bishop stated:

1. That one-third should be deducted from all repairs, except calking and painting, and stores, like

provisions and things of those kind that are taken aboard (Ap. 528, 531). This deduction, according to the witness, was to be made under the provisions of clause 8, wherein it was stated that one-third should be deducted from the cost of all repairs of injuries and losses on the vessel by the perils insured against * * * as a commutation for the average difference between new and old * * * (Ap. 528-9).

2. That one-third should be deducted from calking, because the stipulation in clause 8 provided that instead of deducting one-third for new on the expense of re-metaling, including docking and calking, there should be deducted two and one-half per cent of the cost of re-metaling, docking and calking * * * for each and every month the metal shall have been on the vessel at the time that it is taken off, and if it shall have been on forty months, or more, the cost shall be wholly borne by the insured. *In lieu of deducting one-third from the calking, two and one-half per cent of the cost of calking, for each month that the vessel had been calked, would be charged to the owner.* This was by virtue of that part of clause 8 providing "in case the vessel shall be on a single bottom the same rule shall apply to docking and calking * * *" (Ap. 529-530).

3. That one-third should not be deducted from the cost of painting, because, according to Mr. Bishop, the stipulations of clause 8 provided that *in case the vessel shall be on a single bottom* (i. e. a vessel that has not copper sheathing in addition to the regular planking [Ap. 478], the same rule should apply to docking and

calking, but *one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured* (Ap. 528, 530).

3. That in lieu of deducting one-third on anchors, copper and calking under the anchors, anchors were allowed net (i. e. without deduction, with the exception of the wooden stock), and instead of the deduction of one-third from calking under the copper, two and one-half per cent was deducted for each month from the time the vessel was last calked.

The foregoing was the usual method, according to Mr. Bishop, "in adjusting losses under this particular form of policy" (Ap. 531).

In view of the high standing of Mr. Bishop in his business, and particularly because of the recognition which appellee accorded him, and his firm, by employing them to make up the general average adjustment on the "Nottingham" (Ap. 238, 334, 361), we respectfully submit that *Mr. Bishop's, as well as Mr. Wilfred Page's, testimony should be accepted as establishing that the adjustment was correctly stated.*

Adjustment Tested by Bishop's Exposition.

Let us briefly examine the adjustment (Page Exhibit 1), prepared by Mr. Page, to determine whether or not it has, in fact, been made up in accordance with the principles which Mr. Bishop said were applicable to an adjustment, as of partial loss for labor

and materials, under the policies covering on the "Nottingham".

The sum of \$79.34, the cost of the preliminary dry-docking, was charged to dockage to be dealt with later in the adjustment.

Of the items covered by the Albina bid:

\$1500, for stores of a consumable nature, was charged to particular average, net, because, as stated by Mr. Bishop (Par. 1, *supra*), no deduction was made from stores of that nature.

\$1000, for cabin furniture, fixtures, etc. was charged to particular average, $\frac{1}{3}$ off, because, as stated by Mr. Bishop (Par. 1, *supra*) one-third should be deducted from all repairs, excepting calking, painting and stores of a consumable nature. Cabin furniture, fixtures, etc., did not fall within the last classification.

\$382, drydockage dues, was charged to dockage to be dealt with later in the adjustment.

\$330, for painting bottom (labor and materials) was charged to bottom painting, to be dealt with later in the adjustment.

\$175, for calking and cementing bottom, was charged to bottom calking, to be dealt with later in the adjustment.

\$17,563, for the remaining repairs under the bid, was charged to particular average, $\frac{1}{3}$ off, because, as stated by Mr. Bishop (Par. 1, *supra*), one-third should be deducted from all repairs, except calking and painting and stores, like provisions.

On the next page of the adjustment, appear the credits allowed by the Walker-Gibbs agreement. Of these:

\$30, for mast-steps, was credited to particular average, net, because, according to Mr. Bishop (Par. 1, *supra*), if made, they would have been a repair from which one-third would have been deducted.

\$75, for overhauling rigging, was credited to particular average net, for the same reason.

\$25, for painting decks, was similarly credited for the same reason.

\$80, for one coat of copper paint for bottom, was credited to bottom painting.

\$475, for three sails, was credited to particular average, $\frac{1}{3}$ off, because, if they had been supplied anew, they would have been included in repairs from which, according to Mr. Bishop (Par. 1, *supra*), $\frac{1}{3}$ would have been deducted.

\$50, for stanchions and iron chock, was credited to particular average, net, for similar reasons.

Six hundred dollars for salting of the vessel, was charged to particular average, $\frac{1}{3}$ off, because it fell within the class of repairs from which such deduction was to be made.

Two hundred and seventy-five dollars, for calking stanchions back of wash strake, was charged to particular average, $\frac{1}{3}$ off, because it was a repair from which such a deduction was to be made.

The total of the dockage expense was \$461.34. This expenditure was distributed over the bottom calking, bottom painting, and particular average, $\frac{1}{3}$ off, in proportion to the number of days required to do the bottom painting, calking and other work requiring drydocking (Rule II, Sec. 2).

The necessary segregation of time was furnished by Mr. Mackintosh, and showed that the bottom painting would have required thirty days for one man; the calking and cementing, thirty-five days for one man, and the other work on the bottom, 25 days for one man, or a total of 90 days. 30/90 of the dockage, or \$153.78, was thus charged to bottom painting; 35/90, or \$179.41, to bottom calking; and 25/90, or \$128.15, to particular average, one-third off. This eliminated dockage from further consideration.

The total cost of calking and cementing the bottom, including its proportionate share of the dry-dockage, was \$354.41. This entire amount was properly chargeable to the owner, because, according to Mr. Bishop (Par. 2, *supra*), two and one-half per cent of the cost of the calking for every month the vessel had been calked, was chargeable to the owner, under the stipulations of clause 8. It appeared from Mr. Thorndyke's testimony that the "Nottingham" was last calked in April, 1907, over forty months prior to the date of the accident (Ap. 475-6).

The total cost of the bottom painting, including its proportionate share of the drydockage, was \$403.78, one-half of which, according to Mr. Bishop (Par. 3,

supra), was chargeable to particular average, net, and one-half to the owner, because of the stipulations of clause 8, providing that in case the vessel should be on a single bottom, one-twelfth was to be deducted from the cost of painting, for every month the paint shall have been on the bottom (Ap. 530). It appeared from Mr. Thorndyke's testimony that the "Nottingham" was last painted in April, 1911 (Ap. 235). Thus, six months had elapsed to the time of the accident, making 6/12, or one-half of the cost of the bottom painting, chargeable to particular average, net, and one-half to the owner.

The foregoing thus disposes of the dockage, bottom calking and bottom painting, all having been charged to the owner, or to particular average.

The total of the items charged to particular average, $\frac{1}{3}$ off, less the credits thereto, was \$18,913.65. From that amount, according to Mr. Bishop (Par. 1, supra), one-third was to be deducted. This deduction amounted to \$6314.55, leaving \$12,609.10. Thus, the total of the particular average, net, was \$14,310.99, and was made up of the \$1500 for consumable stores, \$201.89, the proportion of the cost of bottom painting, not charged to the owner, and \$12,609.10, the cost of other repairs from which the deduction of one-third was made.

It appears, therefore, that the foregoing adjustment was stated strictly in accordance with the principles which Mr. Bishop said were applicable to an adjustment, as of partial loss for labor and materials, under the policies covering on the "Nottingham".

Inasmuch as the policies insured but \$30,000 on a valuation of \$45,000, appellant would have been liable to pay, under such adjustment, 30000/45000ths of said \$14,310.99, or \$9,540.66. *This amount, as we have pointed out before, was \$5459.34, less than the amount required to give appellee the right to abandon as for constructive total loss.*

Albina Bid Challenged.

Appellee sought to get away from the effect of the Albina Engine and Machine Works' bid by asserting that Mr. Robert Mackintosh, who was to do the ship-joiner and rigging work for the bidder, did not bear a good reputation and was incompetent (Ap. 165-6). When requested to give the basis of his opinion of Mr. Mackintosh, Mr. Thorndyke, appellee's manager, admitted that he had talked with no one except Mr. Walker, his Seattle surveyor. He made no investigations of Mr. Mackintosh's responsibility, or of the character of work which he had done, but stated that he understood that Mackintosh had fallen down in repairing the steamer "Elder", which had been wrecked at Gobel, at a time when he, Mackintosh, was dock-master at the drydock, and that Mackintosh had to be dismissed in the middle of the work (Ap. 180-1). Mr. Thorndyke also claimed to have heard that Mackintosh had been in trouble with respect to work on a steamer called the "Beachley" (Ap. 375-6). How lamentably appellee failed in its challenge of the responsibility or capability of either Mr. Mackintosh or Mr. Cornfoot, is shown by Mr. Thorndyke's confession of his misinformation about

Mackintosh having any connection with the "Beachley" (Ap. 376-7); and by the fact that the only connection Mackintosh had with the "Elder", was her docking in damaged condition, for which he received due recognition for having successfully performed a very difficult undertaking (Ap. 59-60). The good record of Messrs. Cornfoot and Mackintosh, as shown by their testimony, of which there is no truthful contradiction in the record, speaks plainly enough of their responsibility. Those men could not have so successfully repaired vessel after vessel of all classes, unless they were fully equipped and possessed of high ability in their line. If they were responsible and capable enough to do similar work for the U. S. Government, they were to repair the "Nottingham" (Ap. 43, 67-8).

The businesslike manner in which they prepared to do the work covered by their bid, demonstrated that they knew what they were about, and that they proposed to do it most thoroughly.

In the absence, therefore, of any proof whatsoever that the Albina Engine and Machine Works' tender would not be carried through to successful completion, we submit that there are no grounds upon which the same can be disregarded in estimating the cost of repairing the damages to the "Nottingham". The call for bids provided that all bidders should submit with their tender, a statement from a reliable indemnity company, agreeing to furnish a surety bond in the sum required in the specifications. This condition was complied with by the Albina Engine and Machine Works,

for it submitted such a statement from McCargar, Bates & Lynch, general agents of a responsible surety company, the Aetna (Ap. 47-9, 117). Certainly that company had confidence in the responsibility of the bidders.

No Evidence of Right to Abandon.

There is no other competent evidence before the court upon which can be grounded the contention that the amount which appellee would be liable to pay under an adjustment, as of partial loss for labor and materials, would exceed half the amount insured.

Other bids were received at the time tenders were requested on the specifications, but appellee did not call any of the bidders as witnesses, and contented itself by simply offering in evidence the copies of the tenders (Ap. 162-3). It is apparent to the court that the bare bids in their total amount, could not serve any evidentiary purpose, for it was absolutely essential to the making of the required computation for determining whether there was a right of abandonment under clause 9, and the conditions of the policies, that the items going to make up the bids be segregated, as was done by Messrs. Cornfoot and Mackintosh. This was necessary to make possible the proper deductions of "thirds" off certain classes of repairs, the pro rating over bottom calking, painting and other bottom repairs, of the costs of dry-docking, and the application to the cost of bottom calking and painting of the deductions based upon the time the vessel had been on her bottom since last painted and calked. *If force and effect is to be given to the provisions of clause 9, then those segregations*

of the costs of repair are absolutely essential to the application of the conditions of clause 8 and the Rules of Adjustment. Force and effect must be given clause 9, for, as we have previously pointed out, its validity and binding quality has been recognized and enforced time over time in all the courts.

But appellee neither offered, nor attempted to make, any such segregation with respect to any of the other bids. Appellee stands, then, without proof of its right to abandon, save as it is based on the bid of the Albina Engine and Machine Works. *The latter establishes, to a demonstration, that the right to abandon, as for a constructive total loss, under the policies, did not exist.* Appellee is, except for the Albina bid, in the same position as was the plaintiff in

Soelberg v. Western Assur. Co., supra,
whereof Judge Hawley said:

"But it is unnecessary to decide in the present case whether the amount of the insurance of \$15,000 in the one case, or \$5000 in the other, or \$75,000, the value of the ship mentioned in the policy, constitute the basis of the computation, because no evidence appears in the record to give any basis whatever for the determination of the percentage of damage."

The District Court Erred.

The District Court erred in several particulars other than those already noted:

In the course of its opinion, it said:

"In determining whether there is liability, the Court must determine whether the loss occasioned

was more than one-half of the payment required under the policy" (Ap. 572).

That is absolutely wrong, under any construction of the policies. The right to abandon, upon which liability in this case alone rests, under the terms and conditions of the policies, only exists if the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) should exceed half the amount insured. In determining whether there is liability, therefore, *the court is not to ascertain whether the loss was more than one-half of the payment required under the policies, but whether the amount which appellant would be required to pay under an adjustment, as of partial loss for labor and materials, would exceed half the amount insured.* There is an irreconcilable difference between whether the loss was more than one-half of the amount insured, and whether the amount which appellant would be liable to pay under such an adjustment is more than one-half the amount insured.

If, by any chance, the court should hold that the marginal clauses overrode the body conditions, so that the right to abandon should be determined by the general law or by the provisions of the California Civil Code, or the Washington Insurance Code, *still the court was in error for then the right of abandonment would be determined by whether or not the loss amounted to one-half of the repaired value of the vessel, and not to one-half of the payment required under the policies.*

By saying that "the court must determine whether the loss occasioned was more than one-half of the payment required under the policy," the court must have been of the opinion that clause 9 was to be enforced for it is only through that clause that "half of the payment required under the policy" could become a part of the test of the right to abandon. As we have just pointed out if clause 9 is not given effect, and the right to abandon is determined by the general law, or the California or Washington Statutes, "half the payment required under the policy" forms no part of the test. The basis of the test then would be, "half the repaired value of the vessel." Thus, it is evident from what is said in that portion of the opinion, that the court was endeavoring to apply the provisions of clause 9, but failed to do so correctly.

This intent is further indicated by the court's reference to the binding quality of the policy stipulations as to value. The valuation in the policy only comes into operation, in connection with the right to a constructive total loss, through clause 9, for the part which the valuation plays is that *it*, together with the amount of insurance, *determines what the Insurance Company will pay in case of partial loss.* In a total loss the full amount of insurance is paid irrespective of the valuation in the policy; in a partial loss, the liability is such proportion of the loss as the amount of insurance bears to the policy valuation. The valuation only comes into operation when the liability for a partial loss under the policy, is being calculated. And in determining whether there is a constructive total loss, the liability for partial

loss only becomes a factor through the enforcement of the provisions of clause 9. Under the general law, or the code, constructive total loss has nothing to do with partial loss liability, but only with repaired value. Hence, unless the court was attempting to apply the provisions of clause 9, its discussion of the validity of the valuation stipulation, was beside the question. Its consideration indicated that it was intending to apply the clause.

But in its endeavor to determine the right to abandon, from the cost of repairs, the court failed to apply correctly either the provisions of clause 9, or the codes, or the general law. In fact, it applied no principles of constructive total loss which could possibly be involved in this case, in any aspect of it whatsoever.

In the first place, the court averaged the bids. Why it refused to accept the lowest tender, upon which alone was there any evidence as to the responsibility of the bidders, the court did not indicate. As we have pointed out, the lowest bidder proved, without a shade of truthful contradiction, his thorough responsibility and capability. He stood ready to back his tender by a bond from one of the standard surety companies, as required by the conditions in the call for tenders. If that bid was responsible, then, we beg to assert, with every respectful deference to the court, that appellant had the right to have its liability determined thereby, and not by higher tenders. By taking the average of the bids, the court figured out a sum of \$15,823.90, which, because it was in excess of half the amount insured, it held established a constructive total loss. If by the same process,

it had taken the lowest bid, and deducted one-third new for old, it would have had \$13,966.66, instead of the \$15,823.90 which it obtained by averaging the bids. Then, if it had taken $30/45$ of the \$13,966.66, it would have had \$8,311.10, and not \$10,424.44. Still following its process, if it had added the so-called salvage adjustment of \$5,399.46, *the result would have been \$13,710.56, less than half the amount insured.*

But the court's computation is not in accord with any principles that are applicable to the case, whatever conception is taken of it. *The court deducts one-third new for old from the total cost of repairs.* By virtue of what provision of the policy, or what rule of law? The marginal clause is silent as to any such procedure; the general law, or the codes, authorize no such deduction in determining a constructive total loss, for under them, such a loss is based upon the cost of repairs without deductions, equalling half the repaired value. *The only source through which deductions of "thirds," new for old, could be made applicable to the determination of a constructive total loss, is clause 9 of the policies.* But clause 9 does not authorize a deduction of one-third from the cost of all repairs, as the court has done, but provides that the right to abandon shall not exist unless the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials, * * * should exceed half the amount insured. It is in making such an adjustment as of partial loss under the provisions of clause 8, that one-third is deducted from the cost of *certain*, not *all*, repairs. This we have already seen in the adjustment that was pre-

paired. For instance, one-third was not deducted from bottom calking, or bottom painting, or the entire cost of drydocking, or consumable stores. Those costs of repairs, and very important items they were, were treated under the provisions of clause 8 and the rules of adjustment, on entirely different principles than the deduction of one-third new for old. Under the general law, or codes, neither "thirds," nor any other deduction, would be made. *When, therefore, the District Court deducted one-third of the cost of all repairs, it was neither applying the clauses of the policies, nor the codes, or the general law.* In fact, it applied no principle pertinent to the case. It was clearly in error.

When the court took the average of the bids, *it was helpless to apply the provisions of clauses 9 and 8 and the rules of adjustment, because appellee made no proof of the various items making up the bids, other than the lowest, so as to permit the required segregation, in order that principles applicable to drydockage, consumable stores, bottom calking and bottom painting, could be utilized.* It found itself right where this court did in *Soelberg v. Western Assur. Co.*, supra, when it held that it was unnecessary to decide whether the amount of insurance of \$15,000 in the one case, or \$5000 in the other, or \$75,000, the value of the ship mentioned in the policy, constituted the basis of the computation, *because no evidence appears in the record to give any basis whatever for the determination of the percentage of damage.* The policy there was identical in form, so far as clauses 8 and 9 were concerned, with that in the case at bar. As there, so here, no evidence appears in this record to

give any basis whatever *for the use of the average of the bids* for the determination of the percentage of damage. Thus, it is established to a demonstration that the District Court, not only erred in the principle which it sought to apply, but also in its attempt to use an average of the bids. It did not, and could not apply the conditions of the policies; it applied no principles known to the general law, or the codes.

What the court meant by constructive abandonment, we are unable to determine from the opinion, unless it be abandonment as for a constructive total loss.

Still further, the court erred in holding that Sec. 2705, of the California Civil Code, was applicable to this case. That section provides:

“A constructive total loss is one which gives to a person insured a right to abandon under section 2717.”

We respectfully submit that the section did not apply, *because the right to abandon was fixed by the conditions of the policies*, and not by Sec. 2717. And that the court attempted to so treat the case, is shown by its deductions of “thirds,” whereas Sec. 2717 makes no allowance of “thirds,” new for old. That section provides:

“A person insured by a contract of marine insurance may abandon the thing insured. * * *

1. If more than half thereof in value is actually lost, or would have to be expended to recover it from the peril;

2. If it is injured to such an extent as to reduce its value more than one-half;

3. If the thing insured, being a ship, the contemplated voyage cannot be lawfully performed

without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances. * * *

No mention of "thirds" in those sections! *When the court deducted one-third of the cost of repairs, it was not applying Sec. 2705 or 2717 of the code nor the provisions of clauses 8 and 9.*

Whatever was the dictum of the Supreme Court of California in

Victoria S. S. Co. v. Western Assur. Co., 139 Pac. 808,

it is inapplicable to the case at bar, because the right to abandon is controlled by the conditions of the policies and not by section 2705 or 2717. But even so, when the remarks of the California Court are read in the light of the question before that court, they will not be held to have destroyed the settled principles, established and upheld by all the courts, that an actual abandonment is essential to a constructive total loss.

Standard Marine Ins. Co. v. Nome Beach L. & T. Co., *supra*;

Soelberg v. Western Assur. Co., *supra*.

The policy in suit in the California case, was a policy on freight. Sec. 2717 provided as to freight:

"4. If the thing insured, being cargo or freightage, the voyage cannot be performed nor another ship procured by the master, within a reasonable time and with reasonable diligence, to forward the cargo, without incurring the like expense or risk. *But freightage cannot in any case be abandoned, unless the ship is also abandoned.*" (Italics ours.)

In that case, the ship was not owned by the same parties who held the freight policy. They had therefore no power of abandonment. By the strict terms of Sec. 2717, abandonment under the freight policy could not be made unless the ship was also abandoned. Thus, if both Sec. 2705, which provided that a constructive total loss is one which gives to a person insured a right to abandon under Sec. 2717, and Sec. 2717, which provided that freightage could not be abandoned unless the ship is also abandoned, should be given effect, in strict accordance with their terms, you could not have had a constructive total loss under the freight policy, because the assured there had no power to abandon the ship. All that the Supreme Court was deciding, then, was that, as respects a freight policy, it was not necessary under Sec. 2705, that there should be an actual abandonment. It was unfortunate that the court used such loose language, but we do not apprehend that this court will on that dicta upheave the settled principle that the right to abandon, and actual abandonment, are conditions precedent to the right to claim a constructive total loss.

The District Court has thus erred in many respects. Inasmuch as none of the evidence was taken before the court, and as this is an appeal in admiralty, we have no doubt but that the doctrine of a trial *de novo* will be applied to the case. The case is one of importance, and it would be a misfortune if the manifest errors, into which the District Court has regrettably fallen, should be permitted to stand as principles of law applicable to con-

tracts of marine insurance. We sincerely believe that they will be corrected by this court.

**GENERAL AVERAGE SHOULD BE CREDITED ON ANY DECREE
TAKEN AGAINST APPELLANT.**

If perchance, this court should hold that appellee was entitled to recover under its policies as for a constructive total loss, there should be deducted from the total amount covered by the policies, the sum of \$3,758.31, which appellant contributed to the general average on the adjustment drawn by Johnson and Higgins (Ap. 520). The total liability under the policies was \$30,000. When, then, appellant paid \$3,758.31 on account of the general average arising on the voyage, it was entitled to have that sum deducted from the \$30,000, or liability in excess of the amount insured by the policy would thereby be created.

The District Court erred, therefore, in not allowing such credit.

SUMMARY.

We most respectfully submit:

1. That the "Nottingham" was unseaworthy, or at least that a conclusive presumption was raised by the evidence that she was unseaworthy, for the voyage, and that by reason thereof the policies in suit were voided.

2. That the marginal clauses did not override the provisions in the bodies of the policies, but that full force and effect can, and should be given to all of the clauses, terms and conditions of the policies, and that the con-

ditions of clauses 8 and 9, and the rules of adjustment, should be held to determine the right to abandon as for a constructive total loss.

3. That no valid verbal abandonment was ever given.

4. That the right to abandon as for a constructive total loss did not exist under the policies, because the amount which appellant would be liable to pay under an adjustment as of partial loss for the labor and materials necessary to the restoration of the "Nottingham" to her former condition, (exclusive of salvage or general average expenses and the cost of funds) would not have exceeded half the amount insured, to wit \$15,000.

We respectfully submit, therefore that the District Court erred as assigned, and respectfully ask that the decree of the District Court may be reversed with instructions to dismiss, with costs and interest, the libel against appellant; and that in any event the decree be modified to allow said credit of \$3,758.31, and interest; and that appellant may have such other and proper relief as this Honorable Court may deem meet and equitable.

Dated, San Francisco,

September 18, 1915.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Appellant.

